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R E P O R T S
OF
C A S E S
DECIDED IN THE
HIGH COURT OF CHANCERY,

BY
THE RIGHT HON. SIR JOHN LEACH,
AND
THE RIGHT HON. SIR ANTHONY HART,
VICE-CHANCELLORS OF ENGLAND.

BY NICHOLAS SIMONS,

Of Lincoln's Inn, Esq. Barrister at Law.

VOL. I.

1826 AND 1827.

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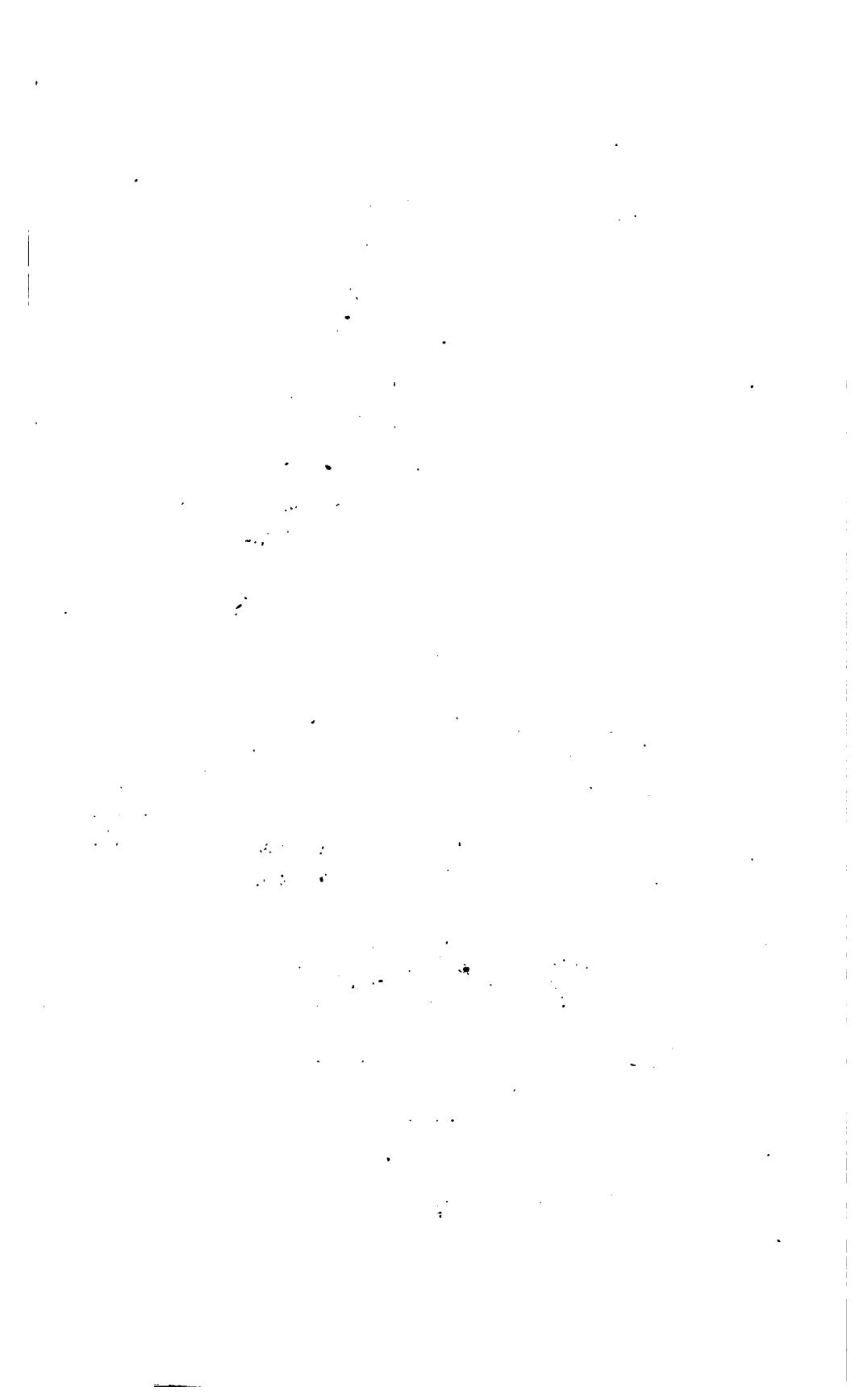
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Sir C. WETHERELL, } - - Attorneys-General.
Sir J^o SCARLETT - - } *April 27. 1827*

Sir C. WETHERELL, } - - Solicitors-General.
Sir N. C. TINDAL - - }



CASES IN CHANCERY

BEFORE THE

VICE-CHANCELLOR.

The Cases marked with an asterisk (*) are reported *Ex Relatione*.

PRATT v. BARKER.

PRETTY v. BARKER.

Judgment affirmed 4. P. & S. 59

1826.

3d March.

*Fraud.
Practice.
Evidence.*

THE Plaintiff, *Pratt*, had formerly been a Horse-dealer. At the time when he executed the Deed after-mentioned, he was eighty years old, and subject to frequent attacks of the gout. The Defendant, *Barker*, was a Surgeon and Apothecary, and, for thirteen years, had attended the Plaintiff, and also was often consulted by him respecting the management of his Property: and, having received the Dividends of some Stock for a deceased Sister of the Plaintiff's, he, after

The Court refused to set aside a voluntary Deed executed by an old and infirm Man in favour of a Person who had attended him as a Surgeon, and

received the Dividends of some Stock for him; it appearing that the nature and effect of the Deed were fully explained to the Grantor, by his Solicitor, before he executed it, and that no undue Influence had been exercised over him. *1 M. & K. 271.*

If a Bill is amended, by adding Parties, after Witnesses have been Examined, their Depositions cannot be read against the new Parties. *p. 5.*

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Cooke v. Lamotte 15 Beau. 239.

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1826.

PRATT
v.
BARKER.

her Decease, received them for the Plaintiff. The latter, being much displeased at having to pay a large Sum for Probate and Legacy Duty upon his Sister's Effects, determined to dispose of his Property in his Life-time; and, accordingly, *Barker*, by his desire, went to Mr. *Sparling*, a Solicitor whom the Plaintiff had before employed, and instructed him to prepare a Declaration of Trust of Two Sums of Stock, the principal Part of the Plaintiff's Property, by which, after the Plaintiff's Decease, certain specific portions of the Stock were to be held in Trust for different Persons, and the residue, for the Defendants, *Barker* and *Osborne*, who were to be the Trustees.

The Deed was accordingly prepared, and executed by the Plaintiff on the evening of the 4th of December 1820.

The Bill alleged that the Plaintiff, for some years before he executed the Deed, had been incapable, from age and infirmities, of managing his affairs: that *Barker*, in the course of his attendance upon the Plaintiff, had acquired great influence over him: that the Plaintiff, when he executed the Deed, was ignorant of its contents, and believed, from *Barker's* representations, that he was making a testamentary, and not an irrevocable disposition of his Property: and it prayed that the Deed might be set aside, as having been fraudulently obtained by the Defendants.

Mr. *Sparling*, however, who was one of the Witnesses in the Cause, deposed that, notwithstanding the instructions he received from *Barker*, he left blanks, in

the ingrossment of the Deed, for the names of the Persons who were to take the residue ; and that, when he attended the Plaintiff with it for execution, the Plaintiff desired him to fill up the Blanks with the Defendants' names, that he carefully read over and explained to the Plaintiff, the nature and effect of the Instrument, and particularly pointed out to him the distinction between it and a Will : that the Plaintiff fully understood the nature and effect of the Deed, executed it voluntarily, and then gave it to *Barker*, and desired him to keep it.

The Plaintiff *Pratt* having died pending the suit, it was revived by *Pretty*, his Executor.

Mr. *Horne* and Mr. *Wilbraham*, for the Plaintiff, commented on *Pratt*'s age and infirmities, the confidential situation in which *Barker* had stood to him, and the influence he had acquired over him : on the improvidence of making an irrevocable disposition of the Property : on *Sparkling* having received his instructions from *Barker*, and having had no communication with *Pratt*, except late in the evening on which the Deed was executed, and when *Osborne* and *Barker* were present : and they cited *Huguennin v. Baseley* (a) and *Griffiths v. Robins* (b).

Mr. *Heald*, Mr. *Shadwell*, and Mr. *Spence* appeared for the Defendants *Osborne* and *Barker*, but were not required to argue the case.

(a) 14 Ves. 273.

(b) 3 Madd: 191.

1826.

PRATT
v.
BARKER.

CASES IN CHANCERY.

1826.

SCOTT
v.
HANSON.

said to be *uncommonly* rich, it was spoken of comparatively only; and that the question throughout the Cause had been, not whether the Land was uncommonly rich Water Meadow, but whether it was Water Meadow at all.

The Cases cited for the Plaintiff were *Fenton v. Browne* (a), and *Trower v. Newcome* (b).

The Vice-Chancellor took time to consider the Case, and then gave Judgment to the following effect :

I do not accede to the argument that the principles upon the subject of Representation are uniformly the same in Equity as at Law: for, in the Case of *Stewart v. Alliston* (c), Lord *Eldon*, C. states the doctrine of the Court to be otherwise. In a Bill for a specific performance it is not sufficient to say that the Purchaser has been negligent, if the Vendor, who seeks the aid of a Court of Equity, has, in his conduct, been incorrect. I agree with Sir *William Grant*, M. R.; in the Case of *Trower v. Newcome*, that a Representation which is vague and indefinite is to be treated, by a Purchaser, only as a ground for enquiry; and the doubt in that Case is whether the Purchaser was not justified in concluding that the Representation amounted to a statement that the Incumbent was Eighty-two years of age. Unless the expression, used in this Case, can be considered as a Representation that the Land in question was not imperfectly, but perfectly watered, then the expression is vague and indefinite; and, upon the best consideration I can give this Case, I think I should strain the meaning of the words "uncommonly rich

(a) 14. Ves. 144. (b) 3 Mer. 704. (c) 1 Mer. 26.

Water Meadow Land," if I were not to confine the meaning to the quality of the Land, and, in that sense, it professes to be nothing more than the loose opinion of the Auctioneer, or Vendor, as to the obvious quality of the Land, upon which the Vendee ought not to have placed, and cannot be considered to have placed any reliance. I lay no stress upon the circumstance that a Rent of the Land is mentioned in the particular of sale; because it is not a Rent fixed by contract with the Lessee, but a part of a gross Rent, paid for the Land in question and other Premises comprised in the same Lease; and is arbitrarily apportioned by the Vendor. The Purchaser must therefore complete his Contract.

Mr. Sugden and Mr. Jacob appeared for the Plaintiff.

Mr. Heald and Mr. Girdlestone for the Defendant.

1826.

Scott
v.
Hanson.

VICARY v. WIDGER. (*)

7th July.

THIS was a Bill of Interpleader.

The Plaintiff obtained the common Injunction for want of an Answer, and, afterwards obtained a special Injunction to stay all proceedings, upon payment of the Money in dispute into Court.

tion on payment of the Money into Court, without first obtaining the common Injunction.

Injunction.
Interpleader.
Practice.

The Plaintiff in a Bill of Interpleader may move at once for a special Injunction.

1826.

One of the Defendants put in his Answer and obtained an Order, *nisi*, to dissolve the Injunction.

VICARY

v.

WIDGER.

That Defendant now moved to make the Order *nisi*, absolute.

Mr. Knight for the Plaintiff.

The VICE-CHANCELLOR:

The common Injunction, as the practice is now settled, was a superfluous proceeding on the part of the Plaintiff; but, an Order to dissolve it, would be a useless expense, as it would leave the special Injunction in force.

I once thought it might be useful, never to grant the special Injunction, upon an interpleading Bill, unless the Plaintiff had first obtained the common Injunction. And my reason was, that it would compel the interpleading Plaintiff to have recourse to this Court, in an early stage of the proceedings at Law, and before much expense was incurred there; instead of leaving him at liberty to file his Bill the day before the trial, and after all the expense was incurred at Law. But a subsequent Case, before the *Lord-Chancellor*, has settled the practice otherwise.

DAVID v. WILLIAMS. (*)

1826.
14th & 24th
July.

Practice.
Exception.

An Exception
may be regularly
filed to the
Master's Report
as to Imperti-
nence after the
Order to ex-
punge, and at
any time before
the Impertinent
Matter is actual-
ly expunged.

2 May K. 302

THE *Master* having reported the Answer impertinent, the Defendant, on the 10th of May, filed Exceptions to the Report, and, on the 11th, obtained an Order to set down the Exceptions. He set them down accordingly, and, on the same day, obtained a Certificate of having so done; and, on the 13th, served the Plaintiff with the Order and Certificate.

On the 11th of May, the Plaintiff had taken out a Warrant to expunge the impertinence and tax the Costs, and attended upon that Warrant. On the 13th, but after the Plaintiff was served with the Order and Certificate, the impertinence was expunged. The Plaintiff then sued out a Subpœna for the Costs, and issued an Attachment against the Defendant. The Defendant now moved to discharge the Attachment for irregularity, with Costs.

Mr. *Knight*, for the Motion, cited *Norway v. Rowe* (a), and said that the Plaintiff had no right to expunge the impertinence, after an Exception had been regularly set down: and that an Exception might be regularly filed, at any time before the Order to expunge was actually executed.

Mr. *Horne* and Mr. *Roots*, *contrd*, contended that, after the Order to expunge was regularly made and

(a) 1 Mer. 135.

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1826.

DAVID
v.

WILLIAMS.

drawn up, it was too late to file an Exception; and that the Order to expunge had been properly acted upon, and the Attachment regularly issued.

24th July.

The VICE-CHANCELLOR:—

The question is whether the Plaintiff has been regular in his proceeding. Upon inquiry into the practice, I find that the Plaintiff is irregular, and that the Defendant is at liberty to except to the *Master's Report* of impertinence after the Order to expunge, and at any time before any proceeding on that Order.

28th January
& 13th July.

ONSLOW v. ONSLOW. (*)

Custom of
London.
Widow.

The Personal Estate of an Honorary Freeman of the City of London, is in case of his dying intestate distributable according to the Custom of London; and his Widow is not barred of her

THIS Bill was filed, by the surviving Trustee under the Marriage Settlement of the late Sir *Francis Samuel Drake*, praying that the Rights and Interests of the Defendants in the sum of 7,500*l.* three per cent. consols, and in certain Furniture and Effects included in the Settlement, might be ascertained and declared by the decree of the Court.

In 1782, in consequence of Lord *Rodney's* victory, Sir *Francis Samuel Drake*, who was an Admiral in the Royal Navy, was presented with the Freedom of the

Customary Share by a Settlement which is expressed to be in lieu of all Dower, or Thirds or other Portion at Common Law or otherwise, out of his Freehold and Copyhold Lands. *144 L. 20*

City of London ; and, on the 5th of August 1784, was made a Liveryman of the Grocer's Company, and took the Oaths.

By the Settlement on the Marriage of Sir *Francis Samuel Drake* with Miss *Pooley Onslow*, dated the 21st and 22d of January 1788, it was witnessed that, " for making a competent Jointure for the said *Pooley Onslow*, in case she should survive the said Sir *F. S. Drake*, in bar of Dower, and for making a Provision for the Children or Issue of the Marriage," certain real Estates of Sir *Francis Samuel Drake* were conveyed to Trustees, to the use of Sir *F. S. Drake*, and his Assigns, for his life ; with remainder to Miss *Onslow*, and her Assigns, for her life ; and it was declared that a sum of 15,000*l.* three per cent. consols, which Sir *F. S. Drake* had transferred to the same Trustees, should be held by them upon Trust to permit Sir *F. S. Drake*, or his Assigns, to receive the Dividends during his life, and, in case his intended Wife should survive him, upon Trust to permit her and her Assigns to receive the Dividends for her own use for her life ; and the Settlement contained divers limitations over, as well of the real Estates as of the Stock, in favour of Children of the Marriage, with an ultimate limitation, in default of Issue of the Marriage, to Sir *F. S. Drake*, his Heirs, Executors, Administrators and Assigns : and it also contained the following declaration :

" It is expressly declared and agreed that the Provision and Settlement, hereinbefore made for the said *Pooley Onslow*, in case she should happen to survive the said Sir *Francis Samuel Drake*, is, or is intended,

1826.

ONSLOW
v.
ONSLOW.

1826.

ONSLOW
v.
ONSLOW.

or hereby declared to be, and shall and is, at all times hereafter, to be construed, deemed and taken to be in lieu, full satisfaction and bar of all Dower or Thirds, or other Portion, at Common Law or "otherwise," which she the said *Pooley Onslow*, can, shall or may, have, claim or demand, out of all or any part of the Freehold or Copyhold Lands, Hereditaments and Premises of the said Sir *Francis Samuel Drake*."

In 1789, Sir *Francis Samuel Drake* died intestate, and without Issue of the Marriage, leaving *Dame Pooley Drake*, his Widow, surviving. By the death and intestacy of Sir *F. S. Drake*, his Widow became entitled to a moiety of the 15,000*l.* three per cent. consols; which was accordingly transferred to her. The other moiety continued invested in the name of the Plaintiff, upon the Trusts of the Settlement; and the Dividends were duly paid to the Widow, and, on her marrying again, to her second Husband, till 1822, when she died. Her second Husband, Mr. *Serjeant Onslow*, who was one of the Defendants to this suit, insisted that Sir *Francis Samuel Drake* having been, at the time of the Settlement and till his Death, a Freeman of the City of London, his Widow was not barred of her rights, by the Custom of the City, to the personal Estate of her late Husband; and that, in the events which had happened, she was entitled by such Custom to one half of the personal Estate of Sir *F. S. Drake*, at the time of his death, and to one half part of the remaining half of such personal Estate, under the Statute of Distributions; and, therefore, required the Plaintiff to transfer to him one half part of the 7,500*l.* three per cent. consols.

The other Defendant was the personal Representative of Sir F. S. Drake, who insisted that by the provisions of the Settlement the Widow was barred of all right by the Custom of London.

1826.

 ONSLOW
 v.
 ONSLOW.

When the Cause came on to be heard on the 26th of January 1826, it was made a question whether Honorary Freemen were subject to the Custom of London as to the distribution of their Estate in the case of intestacy. The Vice-Chancellor, therefore, ordered that the Cause should stand over; "and that the Lord Mayor and Aldermen of the City of London do certify the Custom of the said City, by the mouth of the Recorder of the said City, on the following points, namely:

"First, whether Sir F. S. Drake, the intestate in the Pleadings of this Cause named, and who was not free of the said City by Birth, or by Servitude, or by Purchase, or otherwise than as aforesaid, was, at the time, a Freeman of the City of London, in the sense, meaning and operation of the Custom of the said City, relating to the distribution of the Effects of Freemen who die intestate?

"And, in case the Custom of the City of London as to the distribution of the personal Estate applied to such a Freeman as the said Sir F. S. Drake was; then,

"Secondly, whether there is any Custom of the City of London, by virtue whereof the Widow of a Freeman, having the Benefit and Provision of such a Settlement as the Settlement in the Pleadings in this Cause stated, is debarred from her customary Share of his personal Estate?"

CASES IN CHANCERY.

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 ONSLOW
 v.
 ONSLOW.

On the 13th of July 1826, the Mayor and Aldermen of the city of London, by word of mouth of the Recorder, who appeared in Court for that purpose, certified as follows:—

“ We, the said Mayor and Aldermen of the said City, by *Newman Knowlys*, Esq. the Recorder of the City, by word of mouth of the said Recorder, according to the Custom of the said City, do, in obedience to the annexed order, humbly certify that Sir *F. S. Drake* was, at the time of his death, a Freeman of the City of London, in the sense, meaning and operation of the Custom of the said City, relating to the distribution of the Effects of Freemen who die intestate; and we further certify, in like manner, by the mouth of the said Recorder, that there is not any Custom of the City of London by virtue whereof the Widow, having the Benefit and Provision of the Settlement in the Pleadings in the said Cause stated, is debarred from her customary Share of the Intestate’s personal Estate.”

And the Recorder then, for the better certainty of the Court, delivered in a written Certificate to the same effect; which was signed by the Lord Mayor and Twelve Aldermen.

Mr. *Wakefield* for the Plaintiff.

Mr. *Horne* and Mr. *Daniel* for the personal Representative of Sir *F. S. Drake*.

Mr. *Hart*, Mr. *Shadwell*, Mr. *Sugden* and Mr. *Ellison* for Mr. *Serjeant Onslow*.

The following Cases were mentioned:—*Pott v. Lee (a), Lewin v. Lewin (b), Atkins v. Waterson (c), Babington v. Greenwood (d).*

The Vice-Chancellor decreed according to the effect of the Certificate.

Reg. Lib. 1825. B. f. 1582.

(a) 1 Eq. Abr. 157. (b) 3 P. W. 15. (c) 1 Eq. Abr. 159.
(d) 1 P. W. 530. Pre. Cha. 505.

1826.

ONSLOW
v.
ONSLOW.

COCKERELL v. BARBER. (*)

CHARLES BARBER, by his Will, gave to his Friend and Partner, *John Palmer* 100,000 Sicca Rupees, to be paid as soon as conveniently could be after his death, and appointed *Palmer* his Executor. By a Codicil he gave to *Palmer*, whom he described as the Executor named in his Will, 200,000 Sicca Rupees in addition to the 100,000 Rupees.

The Master's Report stated that Mr. *Palmer* had retained the 100,000 Sicca Rupees, out of assets come to his hands, and that a balance was due to him in respect of the 200,000 Sicca Rupees. It also appeared, by the Report, that Mr. *Palmer*, or some person for his use had received, on account of the Testator's personal Estate not specifically bequeathed, 407,492 Sicca Rupees, and had thereout paid 376,178 like Rupees, which he was allowed by the Master. Mr. *Palmer* also claimed, before the Master, 20,374 Sicca Rupees, being a commission, at the rate of 5 per cent, for collecting the

5th July,
1st August:

Executor.

An Executor in India is entitled to a Commission of 5 per cent on all Assets of a Testator collected by him there, including the Assets which he retains in respect of a Legacy to himself not given to him in the character of Executor, and including Monies belonging to the Testator, which were in the hands of a Commercial House in which the Executor was, and the Testator had been a Partner.

Sensible opinion 2. Rep. 57.

Matthews & Bagshaw c 4
14 Beau. 124.

1. 1m. 2. 1. Beau. 222.
3. 4. 1. 1. 617.
Gentle v. Dailey, 1. Beau.
2. 1. 15. Courtall v. C.
13 Beau. 105.

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Estate of the Testator; and, the *Master* having disallowed the claim, he excepted to the Report.

On the 29th of June 1818 the Exception was heard, and the *Vice-Chancellor* referred it back to the *Master* to inquire, whether, according to the course of the Court in *India*, an Executor, who is also a Legatee, has a right to charge Commission.

On the 23d of June 1821, on a rehearing of the Exception, the *Vice-Chancellor* ordered that it should be referred to the *Master* to inquire, whether, according to the course of the Court in *India*, an Executor, who is also a Legatee, but having his legacy not given to him in the character of Executor in *India*, is entitled to Commission, at the rate of 5 per cent, for collecting the Estate of a Testator in *India*; and, in case the *Master* should find that, according to the usage in *India*, such Executor and Legatee is entitled to such Commission, then that the *Master* should inquire and state to the Court whether *Palmer* was entitled to such Commission, upon the receipt of such part of the Testator's Estate as was necessary for the payment of his Legacies, or any and which of them; and also whether he was entitled to such Commission in respect of so much of the Testator's Estate as, at the time of the Testator's death, consisted of Money or Securities for Money in the hands of *Palmer*, and his Copartners in trade in *India*, of whom the Testator was one, or any or either of them, with liberty to the *Master* to state any special circumstances.

The *Master*, by his Report, made pursuant of this Order, stated that a case and the opinion of Mr. Serjeant *Spankie* * thereon had, amongst other documents,

* Late Advocate-General at Calcutta.

been laid before him, and that the Solicitors for all Parties had agreed to his receiving this case and opinion in evidence; and that, upon considering the several matters referred to him, and what had been laid before him, he was of opinion, and, therefore, found that, according to the course of the Court in *India*, and the usage there, an Executor, who was also a Legatee, but not having his legacy given to him in the character of Executor in *India*, was entitled to a Commission, at the rate of five per cent, for collecting the Estate of a Testator in *India*; and that he was so entitled on all sums collected and received by him, and with which he was chargeable in his account of assets, without distinction as to the same being necessary for the payment of legacies or debts, or otherwise, and without regard to the circumstance, when it occurred, that such assets had arisen from debts due to the Testator by a mercantile house in which the Executor himself was a Partner and liable as such; and the *Master* therefore found that the Defendant *John Palmer* was, in like manner, entitled, according to the course of the Court in *India*, and the usage there, to such Commission upon the receipt of such part of the Testator's Estate, as was necessary for the payment of his Legacies or any of them; and that he was entitled to such Commission in respect of so much of the Testator's Estate, as at the time of his death consisted of Money or Securities for Money, in the hands of *Palmer* and his Copartners in trade in *India*, of which the Testator was one, or any or either of them.

A Petition, by Mr. *Palmer*, to have the Report confirmed, and a Cross-petition, by other Defendants, praying that the Report might not be confirmed, and that it

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might be declared that *Palmer* was not entitled to the Commission, now came on to be heard.

Mr. *Sugden* and Mr. *Rose*, in support of the Cross-petition :—

It seems clear that the Legacies, in this case, were given to Mr. *Palmer*, in his character of Executor. *Read v. Devaynes*(a). In that case the *Master of the Rolls* said, “Wherever the Appointment and the Legacy are contained in the same Will, the Executor must prove, or he shall not have the Legacy.” *Stackpoole v. Howel*(b) and *Dix v. Reed*(c) are to the same effect; and the rule is clear, *prima facie*, against Executors, who must show particular circumstances in the case, to prevent the construction that the Legacy is annexed to the office. In the present Case, the Legacy is in the same Will; and, when a further Legacy is given by the Codicil, the Testator describes the Legatee as his Executor. It is, therefore, clear that, if Mr. *Palmer* had not proved the Will and acted as Executor in collecting the assets, he would not have been entitled to the Legacy. *Freeman v. Fairlie*(d), decides that, if an Executor has a Legacy given for his trouble in the execution of the Trusts of the Will, he is not entitled to a Commission on his Receipts or Payments.

Mr. *Hart*, for other Parties in the same Interest :—

If the principle which the *Master* has adopted is to prevail, then, if an Executor is Legatee of Nineteen-twenty-

(a) 3 Bro. C. C. 95, and S. C. 2 Cox. 285. (b) 13 Ves. 417.
(c) 1 Sim. & Stu. 237. (d) 3 Mer. 24.

tieth Parts of a Testator's Estate, he is also to take the remaining Twentieth, for his own benefit, in the shape of Commission.

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Mr. Pepys for Mr. Palmer:—

It is true there were some strong opinions stated by the *Master of the Rolls* in *Read v. Devaynes*, but these opinions were not acted upon; for, as the Executor there had proved the Will, a Decision according to the opinions expressed, was unnecessary. But Mr. *Mitford*, now Lord *Redesdale*, who was one of the Counsel in that Case, seems to have been startled by the Doctrine laid down by the *Master of the Rolls*. It is plain that what was laid down in *Stackpoole v. Howell* and *Dir v. Reed* is the true principle; and that, where there is no more than an appointment of Executor, and a Legacy to the Person so appointed, the Gift is annexed to the office. But, in this Case, there are, in other parts of the Will, which are not stated in the Petitions before the Court, other motives mentioned for the Legacy. And, if the Legacy given by the Will, is not annexed to the office, it is clear that the Legacy in the Codicil is not so annexed; and, although Mr. *Palmer* is mentioned in the Codicil as Executor, the word Executor is there introduced merely as an additional description of the individual.

The Vice-Chancellor ordered the *Master's Report* to be confirmed, and allowed the Commission to be retained by Mr. *Palmer*.

“ This Court doth, in both Petitions, order that the said *Master's Report*, dated the 19th day of July 1826,

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be confirmed: and this Court doth declare that the Petitioner, *John Palmer*, is entitled to be allowed, on passing his Accounts before the *Master* in this Cause, commission, after the rate of Five Pounds per Cent, upon all the Assets of the Testator, *Charles Barber*, collected and received, or to be collected and received by him in *India*, without distinction as to the same being necessary for the payment of Legacies and Debts, or otherwise, and without regard to the circumstance, whether such Assets have arisen from Debts due to the Testator from, or consisting of Money in the hands of the Petitioner and his Partners in Trade in *India*, of which the Testator was one or any or either of them. And it is ordered, that all Parties be paid their Costs of these applications, to be taxed by the *Master* out of the Testator's residuary Estate.

Reg. Lib. A. 1825, f. 1845.

21st & 22d July
and

14th August.

NAPIER v. NAPIER. (*)

Power.
Devise.

A Testator makes a general Devise of all his Lands in Nine Parishes; in

Five of them he had only Lands in Fee; in Three others he had

only Lands over which he had a Power of Appointment; in the other he had Lands in Fee, and also Lands over which his Power extended: all the Lands pass by his Will, except the Lands in the latter Parish which were subject to his Power.

ON the hearing of an Exception to the *Master's* Report in this Cause, the question was, whether the Will of *Edward Berkeley Napier* operated, as to a certain Estate, as an execution of a power reserved to him by his Marriage settlement.

The Suit was instituted, by the infant Grandson of the Testator *Edward Berkeley Napier*, for the execution

19th May 515. 31m 270. 129d E 594

of the Trusts of the Will of his Father *Gerard M. B. Napier*. Under the proceedings in the Cause, certain Estates were directed to be sold. When the Abstract of Title was delivered to one of the Purchasers, the question as to the execution of the power was raised ; and, on a Motion to compel the Purchaser to pay his Purchase Money into Court, it was referred to the *Master* to inquire whether the Will was an execution of the power, as to part of the Estates. The *Master* having reported in the affirmative, the Purchaser excepted to the Report.

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The question arose under the following circumstances :

By Indentures of Lease and Release, dated the 27th and 28th of May 1790, being the Settlement on the Marriage of *Edward Berkeley Napier*, Esquire, with *Sarah Martin*, certain Messuages, Lands and other Hereditaments, in the Parishes of *Lamyat* and *East-Pennard* in *Somersetshire*, were conveyed to the use (after the Marriage) of *Edward Berkeley Napier*, and his Assigns, for his life, without impeachment of Waste, with remainder to the use of Trustees and their Heirs during his Life upon Trust to preserve contingent remainders, with Remainder to the use of *Sarah Martin*, and her Assigns, for her life, with remainder to the use of such Child, or such one or more of the Children of *Edward Berkeley Napier* and *Sarah Martin*, and for and during such Estate or Estates, Interest or Interests, and in such Parts, Shares or Proportions, and Manner and Form, and with and under such Restrictions, Limitations over, Charge and Charges for the benefit of the same Children, or some or one of them, or without any Restriction, Limitation over, or Charge, as *Edward*

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Berkeley Napier, at any times thereafter, in or by any Deed or Deeds, Writing or Writings, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of and attested by Two or more credible Witnesses, or in and by his last Will and Testament in writing, or any Codicil thereto, to be by him signed and published in the presence of and attested by Three or more credible Witnesses, should nominate, limit, direct or appoint, and, for want of such nomination, limitation, direction or appointment, to the use of all and every the Child and Children of *Edward Berkeley Napier* and *Sarah Martin*, equally to be divided between them (if more than One) as Tenants in Common in Tail, with cross remainders between or amongst them in Tail, with remainder to the use of the right Heirs of *Edward Berkeley Napier*, for ever.

There was Issue of the Marriage Two Children, *Gerard Martin Berkeley Napier*, and *Letitia Sarah Napier*.

Sarah Napier, formerly *Sarah Martin*, the wife of *Edward Berkeley Napier*, died in his life-time, and before the date and execution of his Will.

Edward Berkeley Napier was also, at the time of making his Will, seised of Eleven Acres of Land, or thereabouts, situate in the Parish of *Lamyat*, and which had been purchased by him since the date and execution of the Settlement, and consequently were not included therein. He afterwards made his Will, dated the 8th of June 1799, and duly executed by him, and attested in the manner required by the Settle-

ment and by the Statute of Frauds for the Devise of Freehold Estates of Inheritance, and, after bequeathing a Legacy of 10,000*l.* to his Daughter *Letitia Sarah Napier*, to be paid to her on her attaining the age of Twenty-one Years, or day of Marriage, which should first happen, he proceeded in the following manner:—

“ I give, devise, limit and bequeath unto my Son *Gerard Martin Berkeley Napier*, his Heirs, Executors, Administrators and Assigns, all and singular my Manors, Messuages, Lands, Tenements and Hereditaments, situate, lying and being in the several and respective Parishes of *Martock, Tintenhall, Ivelchester, Sock Dennis, Lamyat, Diteheal, Bruham, Burton and East-Pennard*, or elsewhere within the said County of *Somerset*, and every part and parcel thereof, to hold the same Premises, with their Rights, Members and Appurtenances, unto and to the use of my said Son *Gerard Martin Berkeley Napier*, his Heirs, Executors, Administrators and Assigns, according to the nature of the said Estates respectively; but, in case my said Son shall happen to die before he shall attain the age of Twenty-one Years, without leaving lawful issue of his body living, or *in ventre sa mere* at the time of his decease, which shall afterwards be born alive, then I give, devise, limit and bequeath the same Manors, Messuages, Lands, Tenements, Hereditaments and Premises, and every part and parcel thereof, unto and to the use of my said Daughter *Letitia Sarah Napier*, her Heirs, Executors, Administrators and Assigns, according to the nature of the said Estates respectively; but in case my said Daughter shall happen to die before she shall attain the said age of Twenty-one Years, and without leaving lawful Issue of her body living at the

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time of her decease, then I give, devise and bequeath unto my Relations, *John Berkeley Burland, Esquire, Henry Berkeley Portman, Esquire, Edward Berkeley Portman, Esquire, Thomas Berkeley Troyte, Esquire*, and the Reverend *Edward Berkeley Troyte, L. L. D.*, Sons of my Aunt, *Mrs. Arundel Troyte*, and *Charles Knatchbull, of Babington*, in the said County of *Somerset*, Esquire, all and singular the said Manors, Mesuages, Lands, Tenements, Hereditaments and Premises, and every part and parcel thereof, with their Rights, Royalties, Privileges, Advantages, Emoluments, Hereditaments and Appurtenances, to hold the same Premises, with their Rights, Members and Appurtenances, unto the said *John Berkeley Burland, Henry Berkeley Portman, Edward Berkeley Portman, Thomas Berkeley Troyte, Edward Berkeley Troyte*, and *Charles Knatchbull*, their Heirs, Executors and Administrators, to for and upon the several Uses, Trusts, Intents and Purposes, and subject to the Provisoes and Declarations hereinafter expressed and contained of and concerning the same, (that is to say), to the only proper use and behoof of *Letitia Napier*, my Mother, and her Assigns, for and during the term of her natural life," with divers remainders over.

In a subseqent part of the Will, the Testator directed his Executors to take care of certain Title Deeds in his dwelling-house, and, amongst others enumerated, " also Mrs. Martin's Marriage Settlement, under which she has only an interest for her life in an Estate at Lamyat, a copy of which Settlement will be found among the Title Deeds of my Lamyat Estate."

Mr. Preston in support of the Exception :—

This Will is not an execution of the Power as to the settled Lands in *Lamyat*.

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1st. It has no reference to the Power of Appointment. The words used in it are "I give, devise, limit and bequeath," and, of these, the word "limit" is the only one that can be considered as in any degree referable to a power.

In order to make a valid execution of a Power, there must be a description of the Property, or a reference to the Power, or something to show an unequivocal intention to execute the Power. The Law has been accurately laid down on this subject, in the recent Case of *Doe v. Roake*(a), where it is said: "No terms, however comprehensive, although sufficient to pass every species of Property, freehold and copyhold, real and personal, will execute a Power, unless they demonstrate that the Testator had the Power in his contemplation and intended to execute it." In this respect, Cases on the execution of Powers proceed on exactly the same doctrine as Cases of Election. Where a party is put to his election, it must be clearly shown that there was an intention to affect the Property.

As to the reference to the Settlement in the latter part of the Will, it is plain that it was without any reference to the contents of the Settlement, which is merely mentioned as one among a number of Deeds in a particular house.

(a) 2 Bing. 497. 513 & C. 720

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had a Power of Appointment. His Son, the first Devisee, was an object of the Power; but there are Devises over, in certain events, to persons who were strangers to the Power.

It is admitted that the Lands in the five Parishes where he had only Lands in Fee, pass by this Will. It is admitted that the Lands in the three Parishes, where he had only Lands subject to his Power, also pass by this Will, upon the principle that the Will, as to the three Parishes, would be otherwise wholly inoperative. It is admitted that his Lands in Fee, in the Parish of *Lamyat*, pass by this Will; and the only question is whether the Lands pass in the Parish of *Lamyat*, which are the subject of this Power.

The Purchaser insists that there is no reference to the Power; and that the Devise of Lands in *Lamyat*, being satisfied by the Lands in that Parish to which the Devisor was entitled in Fee, the Lands in *Lamyat* subject to the Power do not pass.

For the Vendors it is insisted that, in effect, there is a reference to the Power; for the admission that the Lands do pass in the three Parishes, in which the Devisor had only Lands subject to the Power, is an express admission that the Devisor had the Power in view at the time of making his Will. And the Vendors further insist that reference is made to the Power, by the Clause in the Will which states that a Copy of Mrs. Martin's Marriage Settlement, under which she has a Life Interest in an Estate at *Lamyat*, will be found among the Title Deeds of the Devisor's *Lamyat* Estate.

Mrs. Martin's Marriage Settlement is not the Settlement under which the Devisor's Power over the *Lamyat*

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Estate arises; and I do not, therefore, perceive how reference is there made to his Power.

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With respect to the first point made by the Vendor, if it were unprejudiced by decision, it would present very great difficulty. But the very point occurred in *Lewis v. Llewellyn*, (g). There the Testator, having Freehold and Copyhold Estates, which were subject to his Power, and other Freehold Estates in Fee, made a general Devise of all his real Estates; and it was held that the Copyhold Estates subject to the Power did pass by the Will; but that the Freehold Estates subject to the Power, did not pass. In cases of this nature, I think it for the advantage of the Public to abide by Decision, until that Decision is corrected by the Court of Ultimate Resort.

The Exception therefore must be allowed.

(g) 1 Turh. 104.

BLAIN v. AGAR.

2d & 7th Nov.

Joint-stock
Company.
Fraud.
Parties.

The Share-
holders in a Joint-

THE Bill was filed by five Persons, on behalf of themselves and the other Parties to an Indenture of the 30th of January 1826, who were, either originally or by assignment, holders of 1,690 Shares in a Company called

stock Company are entitled to relief in Equity, where the conduct of the Directors has been Fraudulent, or a violation of the terms on which the Company was formed. *Myl 4 K. 73.*

If several of the Shareholders assign by Deed their Deposits to others, and appoint the latter their Attorneys for recovering their Deposits, the Assignees cannot sue on behalf of themselves and their Assignors; but the latter, however numerous, must be Parties to the Suit.

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"*The Royal Stannary, or British Mining Association.*" The Defendants were the Directors of the Company. The Bill stated that, in 1825, the Defendants, or the majority of them had caused to be printed and published a Prospectus, which, after mentioning the Capital of the Company to be 500,000*l.* in Shares of Fifty Pounds each, the names of the Directors, Trustees, Bankers and other Officers, stated that the Directors had then the opportunity of selecting in *Wales, Devon, and Cornwall* several Mines which were then being worked, and others in a state fit to make returns as soon as steam-engines, &c. could be erected, and that they therefore calculated on obtaining almost immediate benefits for the adventurers in the Undertaking: that in consequence of this Prospectus more than 20,000 Shares were applied for before May 1825: that these applications were acceded to to the extent of 6,200 Shares only, the Defendants intending to keep the remainder for themselves, in case they could make a profit by sale of them, and, if not, to reject them: that Deposits of Five Pounds per Share were paid upon the 6,200 Shares to the Bankers and upon the account of the Directors, and that Receipts were given for the same accordingly: that some of the original Shareholders afterwards transferred their Shares to other persons, by which means the Plaintiffs and the other Parties on whose behalf they sued, became, in November 1825, and were at the time the Bill was filed, the holders of 1,690 Shares: that since the Plaintiffs had purchased their Shares they had discovered that some of the persons who were named as Directors in the Prospectus had never acted as such, but had always been strangers to the affairs of the Company, and that such of the Defendants as were named as Directors in

the Prospectus had of their own sole, assumed authority admitted the other Defendants into the Directorship: that the Plaintiffs were ignorant of the names of all the Shareholders except those on whose behalf they sued: that the Defendants had taken Mines and expended Money in working them when part only of the Shares had been disposed of, and Deposits of Five Pounds only had been paid even upon those Shares: that no Deed for establishing or regulating the affairs of the Company had been prepared: that the Defendants refused to take upon themselves the 3,800 Shares they had reserved, or to pay the Deposits thereon; and that they had paid 2,500*l.* to a person whom they denominated as the projector of the Scheme, but whom the Plaintiffs had never heard of before. The Bill charged that under these circumstances the Monies which had been paid by the Plaintiffs and the other persons on whose behalf they sued, had been obtained by fraud and misrepresentation, and for a purpose which had failed, and could never be carried into effect. It then set forth an Indenture of the 30th of January 1826, made between the persons whose names were mentioned in the Schedule thereto, of the first part, and the Plaintiffs, of the other part, whereby the former assigned to the latter the Deposits paid on their Shares, and appointed the latter their Attornies to do any lawful acts to dissolve the Association, and to recover the Monies thereby assigned from the Directors, Bankers or Trustees of the Company: and it was declared that the Plaintiffs should stand possessed of the Monies so to be recovered in Trust for the Parties thereto of the first part. The Bill then alleged that the Parties to that Indenture of the first part were very numerous, and amounted to so many as to render it exceedingly inconve-

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nient to place them as Parties on the Record; and that the doing so would lead to so many difficulties as would render it impossible in effect to obtain a Decree. It prayed that the Defendants might be decreed to pay to the Plaintiffs the Sums which had been paid on the Shares as before mentioned, with Interest.

The Defendants put in a general Demurrer to the Bill.

Mr. Hart and Mr. Theobald in support of the Demurrer:—

This Association is, to all intents and purposes, a Partnership, *Beaumont v. Meredith* (a). On what principle then can these Plaintiffs be entitled to relief in a Court of Equity? They alledge that they have advanced certain sums of Money to form the Capital of a Partnership, which has been abandoned, and that therefore, they are entitled to have their Money returned. This is nothing but the subject of an Action for Money had and received. *Nockels v. Crosby* (b).

Next: this being a Partnership, all the Partners ought to have been made Parties to the Suit. Besides, most of the Shareholders are Assignees of Shares, and as the Shares are mere *chooses in action*, the Assignors ought to have been made Parties to the Suit; for they might have no right to assign their Shares. And if the Assignors can divest themselves of all responsibility by assigning their Shares, the Assignees may do so too, by the same means.

(a) 3 V. & B. 180.

(b) 3 Barn. & Cress. 814.

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The Bill charges the Directors with fraud. Now although the original Shareholders might be entitled to prefer this charge against them, their Assignees can have no such right; for there is no privity between them and the Directors: and, therefore the Assignees may have no right to recover the Deposits from the Directors although the original Shareholders might (c), especially as it does not appear that the Shares were transferred with the consent of the Directors.

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The *Attorney-General* and Mr. *Knight* in support of the Bill:—

The principle upon which these Plaintiffs come to a Court of Equity for relief, is the same as that which prevailed in *Colt v. Woollaston* (d).

Upon the facts stated in this Bill, there can be no doubt that the object of these Directors was imposition from the beginning; and that the scheme was a bubble. The Directors kept back 3,800 of the Shares in order that they might sell them for their own profit, although the whole of the Shares might have been disposed of. They moreover have spent all the Money, that was subscribed, and have given a great part of it to a Projector, though no such person was mentioned in the Prospectus, and the Plaintiffs never heard that there was such a person until they learnt that the Money had been paid to him.

This is not a Case of a Partnership. On the contrary, the Plaintiffs expressly disclaim the relation of

(c) Mitf. 129.

(d) 2 P. W. 154.

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Partners. They seek no Accounts, nor is their object either to establish or dissolve a Partnership. They merely say that the Defendants have got possession of their Monies, fraudulently, and that they are entitled to get them back again without making any of the other sufferers Parties to the proceeding. There is no Contract nor any thing in common between these Plaintiffs and the other persons who have been deceived. Each sues in his own right, and for his own Money. Besides, these Plaintiffs sue in two characters, viz. as Shareholders themselves, and as Trustees for the Parties to the Deed of the first part. At all events they are entitled to recover their own Deposits

The Bill contains an express allegation, that the Plaintiffs are ignorant of the names of all the Shareholders, except those who are Parties to the Deed.

Mr. Hart, in Reply:—

In order to bring this case within the principle on which *Colt v. Woollaston* was decided, it ought to have been alleged that the Directors, when they allowed the Prospectus to be published, knew that the scheme could not be carried into effect, or was not intended so to be. The Bill states quite a different case, namely, that they did not allow it to be carried into effect, but, contemplating that it would be a profitable concern, retained a large number of the Shares for themselves.

When a Record discloses a great variety of Interests which are not brought before the Court, it is not sufficient for the Plaintiff to say that he has not made the persons having those interests Parties to the Suit, because he does not know their names. He ought to

call upon the Defendants to disclose their names to enable him to make them Parties to the Record.

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The *Vice-Chancellor*, after stating the material Contents of the Bill, added :—

To this Bill all the Defendants have put in a general Demurrer for want of equity.

Upon this Demurrer it is not necessary to consider whether the Plaintiffs are entitled to the particular relief prayed, but whether they are entitled to any relief; and, being of opinion that the conduct of the Defendants has been wholly unjustifiable, I over-rule the Demurrer for want of equity.

The Defendants have, however, by their Counsel, demurred, *ore tenus*, at the Bar, for want of Parties, who they insist are necessary in order to enable the Court to do complete justice in this Suit. The Plaintiffs sue, on behalf of themselves and certain other persons who are Subscribers, together, of 1,690 Shares, and who have executed a Deed, stated in the Bill, by which they assign, to the Plaintiffs, their respective Interests in this Concern, and constitute the Plaintiffs their Attornies to institute any Action or Suit, in order to give effect to their Interests, or to enter into any compromise for their Claims; but upon condition that, after deducting their Expenses, the Plaintiffs are to hold, what they shall so recover or receive, in Trust for the said other persons, respectively. Amongst many objections for want of Parties, the Defendants insist that these other persons ought to have been named as Parties to this Suit.

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The Plaintiffs do not deny that, according to the general Principles of a Court of Equity, these other persons ought to have been Parties. But they urge at the Bar, what is indeed stated in the Bill, that these persons are very numerous, and that naming them as Parties on the Record, would, in all probability, render it impossible for the Plaintiffs to obtain a Decree in the Cause. This allegation may be very true. In certain special cases the Court has adopted a practice which, by permitting one or more persons to represent in a Suit all who have similar Interests, has avoided the inconvenience which results from numerous Parties. But it has never been stated, as a general principle, that this course may be taken in all cases within the mischief; nor has it ever been done in cases analogous to the present: and, if I were to yield to the reasoning here, I fear I should be doing, what I have no authority to do, not following the practice of the Court, but making a new practice. The Demurrer *ore tenus*, therefore, for want of Parties, is allowed; but it is, of course, without Costs.

In the argument in this Case, the 6 Geo. I. c. 18, commonly called "The Bubble Act," was not adverted to, and, in the view which I have taken of the Case, it was not necessary to notice it: but, in any future proceeding upon this subject, it may be entitled to much attention.

GREEN v. BARRETT.

1826.
2d & 7th
November.

Joint-stock
Company.
Fraud.

THE Plaintiff was a Shareholder in, and the Defendants were the Directors of a Company called: "The *Imperial Distillery Company*." The Bill stated that ten of the Defendants, whose names were mentioned, caused a Prospectus dated the 23d of March 1825 to be printed and distributed, which, after mentioning the Capital of the Company to be 600,000 *l.* in 12,000 Shares of 50*l.* each, the names of the Trustees, Directors, Bankers and other Officers of the Company, and enumerating the probable advantages to be derived, as well to the partakers in such Scheme, as to the Public in general, by means of such Scheme, proceeded to declare that the affairs of the Company were under the management of a Board of Directors; that a Deed of Settlement would be prepared forthwith, which must be executed within Thirty Days after it should be ready for that purpose; and that every person who should neglect to execute the same within that Time, would forfeit all Share and Interest in the Company; that the Deed was to contain all such Clauses and Conditions as the standing Counsel and Solicitors to the Company should deem necessary for carrying on the Business of the Company; that application was then intended to be made to Parliament for an Act to enable the Company to sue and be sued in the names of its Officers, and which Deed of Settlement, when settled and approved by the standing Counsel and Solicitors, and the Act of Parliament, when passed, should be the Deed of Settlement and Act of Parliament for managing the affairs of the Company; that the Shares would be forthwith

A Bill in Equity lies to recover Deposits paid by a Shareholder in a Joint-stock Company, where the Project is a Bubble.

1 Puff. 44.
2 Sum. 204
anti 37. a.
2 Sum. 290
1 M. & K. 73.
4 Puff. 562.
1 George. 407.
Heward. Austin
3 L. Rep. P. 9. 302
Hill. - Lane
11 Eq. 220

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allotted ; and, all communications were requested to be made to the Directors. The Bill further stated that the Plaintiff having applied for some Shares in the proposed Joint-stock Company, the Solicitors or the Secretary, by a letter, addressed to the Plaintiff, in answer, dated the 25th of March 1825, informed the Plaintiff that Twenty Shares in the proposed Company had been allotted to him in consequence of his application : That this letter required a Deposit of 5*l.* on each Share, to be paid by the Plaintiff to the Bankers of the Company : That the Plaintiff having approved of the Scheme developed in the Prospectus, and confiding in the truth and accuracy of it, and in the persons named as Directors therein, and believing that it would be adhered to and carried into effect, paid to the Bankers of the Company, on account of the Directors, the sum of 100*l.* his Deposit upon the Twenty Shares so allotted to him : That the Bankers gave him a Receipt for that Sum, in which they acknowledged it was received of the Directors : That the Plaintiff had since discovered that a small part only of the 12,000 Shares, of which the Company was proposed to consist, was, in fact, disposed of : That the Deposits on several of the Shares which had been disposed of had not been paid, yet the Defendants, as Directors of the Company, determined to proceed in the Scheme, and advertised for the purchase of Premises for carrying on the Distillery Business on an extensive scale : That the ten Defendants before named, as such Directors, and of their own sole assumed authority (after the Plaintiff had paid the Deposits on his Shares), chose the two other Defendants to be Directors, in the place of two persons, who, although named in the Prospectus as Directors, declined to act, and that, thereupon, another Pro-

pectus was published, by the direction of the Defendants, which entirely, or in a great measure differed from the first Prospectus, upon the faith of which the Plaintiff had paid his Deposits upon his Shares; that by a Circular Letter which by the order of the Defendants was sent to the Plaintiff by the Secretary of the Company, bearing date the 4th of July 1825, the Plaintiff was informed that the Directors had purchased very valuable and extensive Freehold Distillery Premises, and Plant, and was required to pay the further sum of 100*l.* (being 5*l.* each on his Shares), on the 19th, when the Scrip (thereby meaning the Receipts before mentioned) could be exchanged for Shares: that the Plaintiff perceiving that some of the persons named as Directors in the original Prospectus, had ceased to be named as Directors thereof, that the terms of the original Prospectus had not been adhered to, and that no Act of Parliament had been attempted or was intended to be obtained for the regulation of the Company, and having learnt that a small part only of the 12,000 Shares had been allotted to, or taken by any person or persons, and that the Deposits on all such of the Shares as had been so allotted had not been paid, but that nevertheless the Directors had proceeded to make such extensive purchase, and to lay out various other large sums of Money, as if the whole of the proposed Capital of 600,000*l.* had been actually raised, refused to pay the further sum of 100*l.* so required to be paid by him: that he was not privy to any departure from the terms of the original Prospectus, upon the faith of which he paid his Deposits upon his Shares, nor to any of the measures taken by the Directors subsequent to the time when he paid his Deposits: that the Defendants were the persons who then called

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themselves, and had, in all matters subsequent to April 1825, acted as Directors of the Company, and that all the Deposits paid upon Shares, were received by Messrs. *Bosanquet & Co.* as the agents, and upon the account of the Defendants, or of the ten first named Defendants, and were held by them at the disposal, and for the use of the Defendants: that, by the means aforesaid, the Plaintiff's Deposit was received by the Defendants: that on the 1st of August 1825, the Plaintiff gave notice in writing to the Directors that he was willing to give up his Shares to them, on having the 100*l.* he had paid returned to him.

The Bill charged that 10,000 Shares had never been disposed of and consequently had never existed, and that not so much as 40,000*l.* of the Capital had in fact been raised: that, notwithstanding, the Directors, without the consent or approbation of the persons who had paid Deposits for Shares, and without any Act of Parliament or Deed of Settlement, proceeded to make extensive Purchases and to lay out large Sums of Money, amounting together to as much as or more than what had been then raised for Capital of the proposed Company, in various expensive Works and Undertakings: that the Directors had become Directors for their own private emolument; and that a great number of Shares had been allotted by them to themselves, and that they had sold and disposed of such Shares at very considerable premiums: that the Plaintiff was ignorant of the names of the other persons who had paid Deposits, but he charged that, under the circumstances, the Money paid by him had been obtained from him by fraud, or by what in the view of a Court of Equity amounts to fraud, and by means of misrepresentation,

and for a purpose which had failed of effect, and could not now ever be carried into effect according to the intent and meaning of the first-mentioned Prospectus.

The Bill prayed that the Defendants might be decreed to repay to the Plaintiff, with Interest, the 100*l.* paid by him in respect of the Shares allotted to him.

Two of the Defendants, one of whom was an original Director, and the other had been appointed in the place of an original Director who had refused to act, demurred, generally, to the Bill.

Mr. Wakefield and *Mr. John Evans*, in support of the Demurrer:—

Notwithstanding the Bill alleges that, under the circumstances stated in it, the Plaintiff's Money was obtained from him by fraud, yet, when those circumstances are looked at, they will be found not to amount to fraud. The purpose for which the Company was formed, was the carrying on of a fair and legitimate Trade. The Scheme was not a bubble; nor does the Bill charge that it was so, or that it cannot be carried into effect. The only fault that can be imputed to the Directors is, that of having acted with too great precipitancy in advertising for premises before they obtained an Act of Parliament. But after the Plaintiff has permitted the Directors to lay out Money on the faith that his Subscription would be paid, he cannot call upon them to repay his Deposit with Interest. Besides if the Plaintiff has a right to recover his Money, his only remedy is by an Action for Money had and received. At all events, the only relief he is entitled to in this Court is to have the Company dissolved. The Bill, however, does not seek that relief.

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Two of the original Directors are not made Parties to the Bill, as they ought to have been: for, although two others were appointed in their place after the Deposit had been paid, yet the original Directors were not discharged from their liability.

Mr. *Knight*, in support of the Bill:—

As to the last objection, the two Directors who have retired, never acted; and it is charged that all the Money came to the hands of the other Directors.

The Bill states a case of departure from the Prospectus amounting to gross misrepresentation; the Plaintiff therefore has a right to say that his Money has been fraudulently obtained from him, and that it ought to be returned. The Defendants have begun to carry the Scheme into execution before the Deed of Settlement, held out in the Prospectus, has been prepared. Instead of 12,000 Shares 10,000 only have been disposed of, whereby the responsibility of the Subscribers has been increased; and on some of these Shares the Deposits are wholly unpaid. By whom or in what manner are the affairs of the Company to be conducted? Nothing is said upon that subject. In this state of circumstances the Directors go on spending the Money, and applying it to purposes different from those for which it was entrusted to them. The Plaintiff has therefore a right to say that he will trust the Defendants no longer.

If in this Case the Plaintiff might have recovered his Deposits in an Action for Money had and received, he is entitled to relief in a Court of Equity.

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The facts of the Case of *Colt v. Woollaston* (a) are of the same nature as those of the present one.

Mr. *Wakefield*, in reply:—

As expense has been incurred, the Plaintiff is not entitled to have his Deposit returned. The Scheme having been put into action, the only relief he can have is an Account.

The *Vice-Chancellor* stated the material allegations in the Bill, and then proceeded as follows:—

Assuming the several Statements in this Bill to be true (which the Demurrer does, in form, admit) I am of opinion that the Plaintiff is entitled to recover back, from the Defendants, the 100*l.* which he has paid; and that the only question is, Whether a Bill in Equity will hold for that purpose, or whether he must have recourse to a Court of Law.

I lay no stress upon the allegation that the second Prospectus materially differs from the first; because such material difference is partly matter of Law; and the Plaintiff, not having stated the nature of that difference, has not enabled the Court to form any opinion upon the subject. Considering that, in substance, the allegations of this Bill amount to this, that the Prospectus for this Undertaking was published, not with any intention to establish a Company upon the principles there stated, but as a snare to persons who might unwarily become Subscribers, and for the purpose of enabling the Directors to make a profit by the sale of Shares which they thought fit to assume to themselves,

(a) 2 P. W. 154.

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it does appear to me that the Case is governed by *Colt v. Woollaston*, and, upon the authority of that Case, I over-rule this Demurrer.

9th & 13th
November.

RUSSELL v. AUSTWICK.

Partnership.
Carrier.

A. B. &c. were Common Carriers from L. to F. a separate portion of the Road being allotted to each, and it having been stipulated also that no Partnership should exist between them.

A. for himself and the other Parties agrees with the Mint to carry Coin from L. to F. and afterwards makes another Agreement with the Mint to carry other Coin to Places not on the Road: Held that all the Parties were entitled to share in the Profits of this Agreement.

IN June 1816, the Plaintiffs and the Defendants agreed to carry on the business of a Common Carrier, between *London* and *Falmouth*, upon the following terms: that the business should be divided into 181 Shares: that the Defendants *Austwick* and *Maddeford* (who had before carried on the same business, in Co-partnership, in and about *London*) should have equally between them Fifty-three of the Shares, and should carry on the business between *London* and *Worting*, in *Hants*: that the Plaintiff *Loscombe* should have Fifty-four Shares and a half, and carry on the business between *Worting* and *Dorchester*: that the Plaintiffs *Russell* and *Thomas* should have Thirty-four Shares and a half, and carry on the business between *Dorchester* and *Exeter*: that the Plaintiff *W. Courtis* should have Fourteen of the Shares, and carry on the business between *Exeter* and *Plymouth*: that the Defendant *Baker* should have Thirteen of the Shares, and carry on the business between *Exeter* and *Five Lanes*, in *Cornwall*: and that the Plaintiff *R. S. Courtis* should have the remaining Twelve Shares, and carry on the business between *Five Lanes* and *Falmouth*: but so nevertheless that no Partnership should exist, or be construed to exist between the Parties, in regard to their said general concern or undertaking, except as

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between the Plaintiffs, *Russell* and *Thomas* only, between the Defendants *Austwick* and *Maddeford* only, and between the Plaintiff *R. S. Courtis* and *Baker* only, and that the adoption of any general style or firm, for the purpose of conducting the separate Concerns aforesaid, or which might give the same the semblance of one Concern, should not extend, or be construed, in any manner, to extend, or make, or form a Partnership between the said Parties, or any of them; but each of them, in his separate Limit or Division, should be considered as conducting an exclusive business, separate and apart from the others or other of them, and should find their or his own Capital for carrying on the said business; and that no one or more of them should be answerable or in anywise accountable for the other or others of them, or for his or their Acts, Receipts, Payments, Disbursements, Debts, Engagements, Neglects, or Defaults, the intent or meaning of the said Parties being to secure an uninterrupted line of communication and carriage from, between, and to the several places aforesaid, consisting of the separate and independent Limits and Divisions aforesaid, which whole line of communication and carriage neither of the said Parties was alone competent, of himself, or equal to keep open and maintain, and the said several Parties to be considered, for all purposes, both as between themselves and the Public in general, separate Carriers, within their respective Limits or Divisions, and carrying on and conducting several and independant Concerns, and not answerable or liable for the Debts, Engagements, Bankruptcies or Failures of any other or others of them, in any manner howsoever: that each of the Parties should receive all such sums of Money as should become payable for the business in his District, and

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should pay certain expenses incurred in that District, and that the balances of such receipts, after deducting such expenses, should be accounted for by each of the Parties to the general Fund of the general Concern and Undertaking, quarterly; and that all Debts becoming due to the respective Parties should be considered as received, and that the said respective balances should be divisible among the respective Parties, in the Shares or Proportions aforesaid ; and which quarterly balances or earnings of the said respective Parties or Districts, after deducting the expenses of such respective Parties or Districts, and the expenses of supplying horses and other things necessary for working the ground taken by such respective Parties, were to constitute the Profits of the respective Parties or Districts.

The Plaintiffs and Defendants continued to carry on the business under this Agreement, from June 1816 until the end of the same month in 1821.

In January 1817, the Defendant *Austwick*, having heard that the Government were going to issue a new silver coinage, which was to be conveyed to different parts of the country, made an application to *G. W. Morrison*, Esquire, the Deputy Master of the Mint, who desired him to write him a letter upon the subject. *Austwick* accordingly wrote the following letter, dated the 11th January 1817 :

“Sir,—Agreeably to your request, I now enclose you a Bill expressing all the towns to which the waggons of Messrs. *Russell & Co.* carry. It will also be proper to observe that they have, for a great number of years, conveyed large quantities of specie to town that have

arrived per H.M.S. and Packets at *Plymouth* and *Falmouth*. For the conveyance of silver from those places previous to the 1st of July last, 10s. per cent. on the real value was paid, and, since that period, on account of the low price of horse-provender, 8s. per cent. has been paid, and 5s. per cent. for gold, Messrs. *Russell and Co.* guaranteeing the safe delivery of the same to the Bank of *England*. The Bankers have usually paid 5s. per cent. on the value of their packages, besides the common carriage, which is proportioned to the distance packages are conveyed; and on the other side have annexed the rates per cent. to the principal Towns. I hereby offer to convey His Majesty's Coin to any of the Towns expressed in the inclosed Bill, or either of the Towns above-mentioned. A broad-wheeled waggon sets out daily which can convey four and a half tons; and I beg to say that we have a repository for valuables at *Exeter*, where any quantity may be safely deposited previous to its being forwarded to the other inconsiderable towns in *Devon* and *Cornwall*. For the responsibility of the proprietors of the said concern I beg to refer you to the gentlemen of the Bullion Office, Bank of *England*. Any further information that may be required will be given, with pleasure, by, Sir, your most obedient Servant, *J. Austwick, London Proprietor.*"

Soon after the sending of this Letter, an Agreement was made between *Austwick* and the Master of the Mint, for the conveyance, by the Waggons belonging to the different Parties, from *London* to the Towns mentioned in the Bill which was inclosed in the Letter, (and all which Towns were in the line of Road between *London* and *Falmouth*), of Packages of Silver Coin, at the rate of 5s. per cent. upon the value of the Coin in each

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Package, besides the common charge for the carriage of the Packages, as if they had been of no extra value.

Shortly afterwards, *Austwick* agreed with the Deputy Master of the Mint to convey Packages of Silver Coin to Towns in *Middlesex* and the adjoining Counties, the Roads to which were, consequently, wholly different from that to the towns before referred to; and to other places, the roads to which were partly the same as, and then branched off from, the Road from *London* to *Falmouth*. Under this Agreement 7*s.* 6*d.* per cent. was to be paid on account of the extra risk in the cross-country Conveyance.

The account which *Austwick* gave of this transaction, in his Answer, was that, in consequence of his attending at the Mint and learning that no person had offered to carry Coin to some parts of the county of *Middlesex* and the bordering Counties, to which the general concern or undertaking never were Carriers, he consulted with *Maddeford*, his Co-partner, thereon, and they agreed to propose themselves to carry the Coin to those places on their own separate account: that, in pursuance of the Agreement between him and the Master of the Mint, various Packages of Silver Coin were delivered to him, at the Mint, to be conveyed to different Towns specified in the Letter of January 1817: that, some time after some of such Packages had been so delivered, he discovered, by the directions given to him, that he was required to send a considerable quantity of them to Places not specified in the Letter, but to other Places branching from them: that he then considered that, in the event of any losses happening after the Packages were delivered to other

Carriers, the general concern would not be liable to make such losses good, but that they would wholly fall on the provincial Carrier who might be employed in the conveyance of the Packages to the bye-places: that such provincial Carriers were, in general, incapable, by reason of their poverty, from making good any heavy losses: that he, on account of himself and his partner *Maddeford*, thereupon went to the Deputy-Master of the Mint, and represented to him the last-mentioned matters, and, at the same time, made a proposal that he would undertake the risk of delivering the Packages at the appointed places branching from the Towns mentioned in the Letter, on condition of his being paid an adequate remuneration for such peculiar risk in becoming General Insurer against all the provincial Carriers; and that the Deputy-Master of the Mint agreed to this proposal.

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The Answer further stated that several of the Parties in the general concern paid various sums of Money, for the carriage of part of the Coin, to different Carriers, not parties to such general concern, which Sums they carried to his and his partner *Maddeford*'s debit in their private accounts, and were paid or allowed the same, by him and *Maddeford*, out of their own Monies, without reference to the accounts of the general concern: that the accounts of the general concern were settled in December 1818: that the carriage of, and the insurance of 5*s.* per cent. on the Coin carried to places branching from the direct Road, were included in those accounts; but that neither the extra insurance of 2*s.* 6*d.* per cent. on the Coin conveyed by him and *Maddeford* and the cross-country Carriers, nor the charge for the cartage of such Coin, nor any insurance

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for the Coin carried to the places which were wholly off the line of Road, was included in those Accounts ; and he admitted that he had received the whole of what he claimed to be due to himself and *Maddeford*, under the second Agreement.

The Plaintiffs, in their Bill (which was not filed until 1823) contended that the second Agreement was made on account of the general Partnership, and claimed to have the Monies received under both Agreements divided between themselves and the Defendants in proportion to the number of their respective Shares. The Defendant *Austwick* claimed the whole benefit of the second Agreement for himself and his Partner, the Defendant *Maddeford*.

It appeared, by the evidence, that the Sums due under both the Agreements were paid by cheques, which were made payable to the Firm in general.

The Plaintiffs had examined, as Witnesses, the Defendant *Maddeford*, the Deputy Master, and another Officer of the Mint; but the whole of the Depositions, except that part which proved the cheques, was objected to, by the Defendants, as not being evidence, and was not permitted to be read.

Mr. *Sugden* and Mr. *Merivale*, for the Plaintiffs :—

All the Parties formed one, entire Partnership.

The Letter of January 1817 was the basis of the second, as well as of the first Agreement. In it *Austwick* refers to the repository at *Exeter*, as belonging to the general Partnership, although he had nothing to do with it; and, when he signs his name, he describes

himself as the *London* Proprietor. It cannot be contended that the rights of the Plaintiffs are at all affected by the circumstance that some of the places to which the second Agreement related were wholly off the Road from *London* to *Falmouth*. That Agreement was a mere supplement to, or continuation of the first. When *Austwick* entered into it, he did not inform the Officers of the Mint that the Coin, about which he was then contracting, was not to be conveyed by the same persons as had conveyed that to which the first Agreement related. The Officers of the Mint of course believed that they were agreeing with the entire Partnership; and it cannot be contended that, if there had been any loss, all the Partners would not have been liable. If then they participated in the risk, they ought also to share in the profits.

Mr. *Hart* and Mr. *Barber*, for the Defendants:—

This is not a Case of a Partnership, as between the Parties themselves, though it may be, as between them and the Public. It is merely a limited engagement of a peculiar species. Each Party was to furnish waggons and horses, and to be answerable for losses, and to receive the profits, on his own portion of the road only. The Agreement between the Parties puts an end to the Plaintiffs' claim. It expressly stipulates that there shall be no Partnership, except as between *Russell* and *Thomas*, *Austwick* and *Maddeford*, and *Courtis* and *Baker*. In 1818 a settlement of accounts took place between the Parties. The Plaintiffs then knew that there had been some extra carriage; because the packages which were to be carried to Towns which are not upon the direct road, had been left at their warehouses. But, notwithstanding, they made no demand

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in respect of such extra carriage, until five years afterwards.

The Defendants are, at least, entitled to a reference to the *Master* to ascertain the Terms of the second Agreement.

Mr. Sugden, in reply:—

There is nothing upon this Record to show that the Plaintiffs knew any thing of the second Agreement.

The Insurance payable under it did not consist of two distinct sums of 5*s.* and 2*s.* 6*d.* but of an entire sum of 7*s.* 6*d.* The original Sum was no longer payable: the increased Sum was substituted for it. This clearly shows that the Officers of the Mint considered that they were dealing, not with an individual, but with the whole Firm.

The VICE-CHANCELLOR:

In the Month of June 1816, the Plaintiffs and Defendants, upon the retirement of a Mr. Russell from business, became Partners in the working of a common stage-waggon from *London* to *Falmouth*, and from *Falmouth* to *London*; each of the Partners being to work the waggon for a certain stipulated distance and to be paid a proportion of profits accordingly. On the 11th of January 1817, the Defendant *Austwick*, on behalf of himself and his said Co-partners, by a letter of that date, made a proposal, to the Deputy Master of the Mint, to convey new silver coin from *London* to the several Towns upon the line of road between *London* and *Falmouth*, at certain rates of carriage which were specified

in the Letter, and for an additional payment of five shillings per cent. on the value of the packages, by way of insurance for safe conveyance; and, in order to satisfy the Public Officer, of the responsibility of the Partnership to enter into such engagement, the letter referred him for satisfaction in that respect to the gentlemen of the Bullion Office at the Bank of England. This proposal being accepted, an Agreement was made to that effect, between the Master of the Mint and the Defendant, on behalf of himself and his Co-partners; Some short time afterwards, but when, in particular, does not distinctly appear, The Defendant *Austwick* entered into a further Agreement with the Master of the Mint, to cause silver coin to be conveyed from *London* to Towns not in the line of the Road from *London* to *Falmouth*, nor specified in the Defendant's Letter of the 11th of January 1817. The road to some of these Towns was partly on the line of Road from *London* to *Falmouth*, and then branched off; and the road to others of these Towns was, in no part, on the line of Road from *London* to *Falmouth*. The new Agreement was for the purpose of guaranteeing the Mint against any loss which might happen in respect of the silver coin, when it was not passing on the line of road from *London* to *Falmouth*, but on provincial or cross-roads. By this new Agreement the Mint, in consideration of this guarantee from loss on the provincial roads, were to pay not 5*s.* per cent. for insurance, according to the first Agreement, but 7*s.* 6*d.* per cent. for all Silver Coin sent from the Mint, without any distinction whether it was delivered at the several Towns specified in the first Agreement, or whether it was sent, partially, or wholly, by provincial or cross-roads. In settling with the Plaintiffs in respect of this transaction with the

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Mint, he has accounted with them only for their shares of the profits made according to the first Agreement, alleging that the second Agreement was entered into by him on the account of himself and his *London* Partner, the Defendant *Maddeford* alone; and that, having reference only to a guarantee on the provincial roads which were not on the line of the common concern, that the Plaintiffs had no interest in the profits made by it. It is true that the common concern had no connection with the provincial roads, which were the occasion of the second Agreement: and it is not upon that ground, that they claim to participate in its profits. But they insist that the second Agreement was entered into by the Officers of the Mint as connected with, and a continuation of, the first Agreement, and in confidence of the responsibility of the Parties to the first Agreement: and the circumstance that, by the second Agreement, 7*s. 6*d.** per cent. is to be paid for the same Coin in respect of which 5*s.* per cent. only was to be paid by the first Agreement, although it be true that the addition is made in respect of a new risk, manifests the opinion of the Officers of the Mint of the connection between the Two Agreements. The testimony of the Officers of the Mint upon this subject, is not so pointed as it might have been, if they had been interrogated as to what passed with the Defendant upon the second treaty; but it is sufficiently plain that the Defendant *Austwick* did not apprize them that he was treating for himself and *Maddeford*, in exclusion of the Plaintiffs, and he does not even assert this in his Answer: and, upon the settled principles of Equity, therefore, he could not exclude them from the same proportion of Profits as they were entitled to under the first Agreement.

Declare, therefore, that the second Agreement, in the Answer of the Defendant *Austwick* mentioned, is to be considered as made on account of the several Parties interested in the first Agreement, in the proportions in which they were entitled under the first Agreement; and let the accounts be taken accordingly; and let the Defendant *Austwick* pay the Costs of the Suit to the hearing.

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FELLOWES v. LORD GWYDYR.

10th & 11th
November.

Specific
Performance.
Misrepresenta-
tion.

THE Defendant, Lord *Gwydyr*, being entitled, as Deputy Great Chamberlain, to the Fittings-up and Decorations of Westminster Hall, at the King's Coronation, sold them to the Plaintiff, who was his Deputy or Assistant in that Office, for 1,000*l.* The Defendant, *Page*, had formerly been a Builder, and had been employed, in that capacity, by Lord *Gwydyr*'s Father, who was also Deputy Great Chamberlain, and also in disposing of the Fittings-up of the Hall at the Trial of the late Lord *Melville*. The Plaintiff did not remove the Articles he had so purchased; but in the Name, and as the Agent of Lord *Gwydyr*, signed an Agreement with *Page*, for the Sale of them to him, for 1,575*l.*; and *Page* undertook to remove them, and to make good any Damage that might be done to the Hall, on or before the 10th of January 1822. This Agreement was signed by the Parties at the Office of Lord *Gwydyr*'s Solicitor, who had previously perused it, and who attested the Signature.

If *A.* in contracting with *B.* falsely represents himself to be the Agent of *C.*, and thereby obtains better Terms, the Court will, notwithstanding, enforce the Contract, unless *A.* knew that such would be the effect of the Misrepresentation.

affirmed
1/28 May. 83.
ante 19. 30th 111
1/1st May. 83.
1/1st K. 434.

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v.
LORD GWYDVR.

The Bill stated that the Plaintiff had made the same stipulation with Lord *Gwydvr*, as to removing the Fit-tings-up, &c. and reinstating the Hall, as was contained in the Agreement with *Page*; and that he had used Lord *Gwydvr*'s Name for the purpose of giving, to that Nobleman, *Page*'s security for the performance of that stipulation; and that Lord *Gwydvr* had refused, either to bring an Action himself, or to permit the Plaintiff to use his Name in bringing an Action against *Page* for a breach of the Agreement. The Bill prayed that *Page* might be compelled to pay the Plaintiff the Money remaining due to him under the Agreement, with Interest.

Page in his Answer said that, when he entered into the Agreement, he was led to believe, by the Plaintiff's representations, that Lord *Gwydvr* was the owner of the Articles; that he signed the Agreement on the faith that he was dealing with Lord *Gwydvr*; that he believed from what he had heard of his Lordship, and known of his Father, that if the Articles were not worth 1,575*l.* his Lordship would not permit him to bear the loss; and that he would not have signed the Agreement if he had known that Lord *Gwydvr* was not entitled to the Articles; and that he had sold the Articles at a considerable loss. Lord *Gwydvr* in his Answer said that his Name had been used by the Plaintiff, in entering into and signing the Agreement, without his consent or approbation.

Mr. *Horne* and Mr. *Keene*, for the Plaintiffs.

Mr. *Heald*, Mr. *Pepys* and Mr. *Warry* for the Defendant, *Page*.

The Plaintiff must have had some improper object in using Lord *Gwydvr*'s Name. He had no authority to

do so from Lord *Gwydyr*. Can he then be constituted Lord *Gwydyr*'s Agent against his will, and come into this Court to enforce a Contract between Lord *Gwydyr* and *Page*, which the former disclaims? *Page* was induced to believe that the Plaintiff was acting as Lord *Gwydyr*'s Agent, not only by the representations made to him by the Plaintiff, but from knowing the connection that existed between them, and from the Agreement being perused by, and signed at the Office of, Lord *Gwydyr*'s Solicitor.

The Plaintiff has by misrepresentation obtained more beneficial terms than he could otherwise have done, and, therefore, this Court will not interpose on his behalf. *Phillips v. Duke of Bucks* (a). *Harding v. Cox* (b).

Mr. *Bligh*, for Lord *Gwydyr*, asked that the Bill might be dismissed as against him.

The VICE-CHANCELLOR:—

If the Plaintiff had been aware that the Defendant, *Page*, would not have treated with any other person than Lord *Gwydyr*, and, for that reason, had concealed his own interest in the transaction, the Cases cited would have applied, and would have come to be considered. But there is no reason to suppose that the Plaintiff had any knowledge that such was the feeling of the Defendant. The Plaintiff was naturally led to apply to the Defendant *Page*, because, having been employed in the sale of such Fittings-up on a former occasion, he had a degree of experience upon the subject which might incline him to the purchase. The Plaintiff states that he used the name of Lord *Gwydyr*

(a) 1 Vern. 227. 2d Edit. (b) In note to last case.

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in the written Contract, in order that *Lord Gwydyr* might have the benefit of Mr. *Page's* engagement to clear the Hall by a stipulated day. This is not a very satisfactory reason. But if the Plaintiff, by the use of *Lord Gwydyr's* name, really desired to conceal the speculative bargain which he had made with *Lord Gwydyr*, it would afford no principle upon which the Defendant could escape from the Contract without special circumstances; and none are proved here. This concealment could work no injustice to the Defendant *Page*. The Plaintiff therefore is entitled to a Decree for the Money due to him upon the Contract.

13th November.

GRAVES v. DOLPHIN.

Annuity.
Bankrupt.
Assignee.

An Annuity given to *A.* for his Personal Support, not to be liable to his Debts, and to be paid from time to time into his proper hands and not to any other Person, and his Receipt only to be a sufficient discharge, passes on *A.'s* Bankruptcy to his Assignees.

THE Testator, *Benjamin Graves*, gave his real and personal Estates to Trustees upon trust (amongst other things) to pay an Annuity of 500*l.* to his Son *John Graves*, for the Term of his natural Life, and then proceeded thus :

" And my Will further is, and I do direct and declare that the said Annuity, or yearly Sum of 500*l.* by me given to my Son *John Graves* for his Life as aforesaid, is by me intended for his personal maintenance and support during the whole Term of his natural Life, and shall not, nor shall any part thereof, on any account or pretence whatsoever, be subject or liable to the Debts, Engagements, Charges or Incumbrances of him, my said Son; but that the same shall be, for the purpose aforesaid, from time to time, as and when the same shall

1 R & M. 396

2 Sum. 404. 1 R & M. 690

2 R & K. 496. Rockford v. Hackman. 9 Hare 480.

from time to time become due and payable, be paid over into the proper hands of him, my said Son, only, and not to any other person or persons whomsoever; and I do further direct that the Receipt or Receipts of him my said Son only for such Annuity shall be a good and sufficient discharge, and several good and sufficient discharges to my said Trustees for the same." *John Graves* having become a Bankrupt, his Assignees sold the Annuity to the Defendant *Freshfield*: and the question in the Cause was whether the Annuity past to the Assignees by the Assignment of the Commissioners.

Mr. *Hart* and Mr. *Wakefield* for *John Graves* contended that the Annuity had not past to the Assignees. They relied on the direction in the Will that the Annuity should be from time to time paid into the proper hands of *John Graves*, and that his Receipts should be a sufficient discharge for the same.

The VICE CHANCELLOR:—

The Testator might, if he had thought fit, have made the Annuity determinable by the Bankruptcy of his Son: but the policy of the Law does not permit property to be so limited that it shall continue in the enjoyment of the Bankrupt, notwithstanding his bankruptcy. Declare that the Defendant *Freshfield* is well entitled to the Annuity in question (a). *May 1/16*

(a) See *Brandon v. Robinson*, 1 Rose, 197; S. C. 18 Ves. 429; and 1 Swan, 481, n.

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14th November.

MENDIZABEL v. MACHADO. (*)

Plea.

A Plea that the Plaintiff has no interest in the subject of the Suit, is a good Plea to a Bill for Discovery and a Commission.

THIS was a Bill for Discovery, and for a Commission to examine Witnesses abroad, in aid of an Action at Law, commenced by the Plaintiff against the Defendant, to recover a very large Sum of Money, out of which the Plaintiff alleged that he was entitled to be reimbursed the Sums which, under the orders of the Executive Government of *Spain*, he had advanced to that Government.

2/Nov/452 —
post 3492 By the Treaty
4 Am 1812 between France
and the Allied Powers, in 1814,
and by subsequent conventions, certain
Funds were placed at the disposal of the
King of Spain, to answer the
claims of Spanish subjects
upon the French
Government,

and those Claims were to be adjusted by Commissioners, and the Funds, in the meantime, were by orders of the King of Spain deposited with the Defendant.

All the important parts of the Bill and Plea are fully stated in the Judgment. It was agreed on the part of the Plaintiff to waive any objection that might be made to the Defence, on the ground of the Plea being over-ruled by the Answer.

In 1823, the Cortes of Spain voted that these Funds should be applied towards the exigencies of the State; and under that Vote, the Minister of Spain borrowed a large Sum from the Plaintiff upon the credit of those Funds, and the Plaintiff took Bills for the amount upon the Defendant, who refusing to pay them, the Plaintiff arrested him, and filed this Bill for Discovery and a Commission to examine Witnesses in aid of his Action: To this Bill the Defendant pleaded the Treaties and Conventions under which the Funds came to his hand for the benefit of the Spanish Creditors on the French Government, and the Plea was allowed.

N. reworded by L'Lyndhurst - in grand style of 1826.

Mr. *Heald* and Mr. *Russell* for the Plea, insisted that, if the facts put in issue by the Plea, were true, (and in the present stage of the Cause they must be taken to be so,) the Discovery sought by the Bill must be utterly useless. *Williams v. Everett* (a), *Yates v. Bell* (b).

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Mr. *Sugden* and Mr. O. *Anderdon* for the Bill:—

It is clear, from the facts stated in the Bill, that an Action would lie against the Defendant for Money had and received. But, if the Plea is to prevail, there must be an end to any such Action; for it would be impossible for the Plaintiff, without the Discovery which is sought by the Bill, to give the evidence necessary to support the Action. This is a negative Plea to a Bill for Discovery. It is admitted that there may be a negative plea to a Bill for Relief: but it is questionable whether such a defence is available against a Bill for Discovery. There is besides, in this Plea, a studied ambiguity as to that part which relates to the particular Fund in the hands of the Defendant. But, if the Case made by the Plea is true, it would afford matter for a valid defence at Law. It has, however, been decided, in *Hindman v. Taylor* (c), that a Plea of matter which is a good defence to the Action at Law in aid of which the Bill is filed, is not a bar to the Discovery.

Mr. *Heald* in reply:—

There is no such rule, as to Bills for Discovery, as that which is contended for. In *Baillie v. Sibbald* (d), the Statute of Limitations was pleaded to a Bill for Discovery in aid of an Action. It might there have

(a) 14 East. 582. (b) 3 Barn. and Ald. 643.
(c) 2 Bro. C. C. 7. S. C. 2. Dick. 651. (d) 15 Ves. 185.

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been said that the matter pleaded to the Bill, was a good Defence to the Action at Law: but it was not so held by the Court, although the Plea was over-ruled upon a different ground (a).

The VICE-CHANCELLOR:—

The substance of this Bill is, that, in the month of April 1822, the French Government placed at the order and disposition of the Spanish Government, a sum of Eighteen Millions and a Half of Francs, of the money of *France*, in *Rentes* or Inscriptions in the Treasury of *France*, and that Twelve Millions of such *Rentes* were shortly afterwards, by order of the Executive Government of *Spain*, paid or transferred into the name of Mr. *Noguera*, who was at that time the *Charge d'Affaires* of *Spain* at *Paris*; and that, in the month of August 1822, Mr. *Noguera*, being removed from his official situation, by the order of the Executive Government of *Spain*, transferred such *Rentes* to the Defendant *Machado*, who was confidentially employed, by such Executive Government of *Spain*, and had received its instructions to hold the *Rentes* so transferred to him, at the order and disposition of such Executive Government; that the Defendant afterwards, in pursuance of instructions from the Executive Government of *Spain*, sold out and transmitted to this country the whole of the said Funds, or the greater part thereof to the amount of 300,000*l.*; that the Assembly of the *Cortes*, convened according to the Constitution of *Spain*, by a solemn and legitimate Act, authorized the Executive Government to apply and dispose of the said Funds to the exigencies of the Executive Government; and that, thereupon, the Execu-

(a) See Beames on Pleas, 276.

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tive Government applied to the Plaintiff *Mendizabel*, who was a Merchant and one of the Contractors-general for supplying the Army of *Spain*, to make advances, for the use of the Government, upon the faith and credit of the Funds so in the hands of the Defendant; and that he, the Plaintiff, accordingly made such advances to the amount of 111,565*l. 12s. 7d.*, and received, in payment of the same, certain Orders or Bills of Exchange, drawn by the Treasurer-general of *Spain*, upon the Defendant. The Bill insists that the Defendant was bound to pay such Bills to the Plaintiff; and that, having refused to accept or pay the same, he, the Plaintiff, had commenced an Action against him in this country, and had caused him to be arrested and held to bail, for a sum of 80,000*l.* And the Bill prays a Discovery, from the Defendant, of the several facts stated, and a Commission for the Examination of Witnesses in foreign Countries, in order to enable the Plaintiff to support his Action. The Bill contains many charges of Admissions and Conduct on the part of the Defendant amounting to acknowledgment of the Plaintiff's title.

To this Bill the Defendant has put in a Plea and Answer. He professes to answer all those Charges in the Bill, which seek to raise a Case against him upon the ground of personal Conduct and Admissions; and, as to all other the Statements and Charges in the Bill, he puts in a Plea, for the purpose of protecting himself from any Discovery, and in order to deprive the Plaintiff of the benefit of the Commission for the Examination of Witnesses.

By his Plea he states the several Treaties which in the year 1814 were entered into between *France*, on

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to *Spain*; and, by that Treaty, *France* had obliged herself to make up the difference.

The Plea further states that, on the 30th of April 1822, a further Treaty was entered into, between *France* and *Spain*, whereby the *French* Government engages to cause payment to be made, into the hands of such person or persons as may, for that purpose, be authorized by the King of *Spain*, of the overplus of the *Rentes*, which the *French* Government kept as a deposit, including the whole amount of the compound Interest. The Plea then avers that the overplus of the *Rentes* mentioned in the last Treaty, was that moiety of the Sum agreed to be paid by *France* to *Spanish* subjects, which, according to the third Article of the Treaty of March 1818, was to remain deposited until the Claims of *Spanish* Subjects were liquidated by the mixed Commission there referred to.

The effect, therefore, of this last Treaty seems to have been, to place this deposit, not in the hands of a mixed Commission, but in the hands of *Spanish* Commissioners only.

The Plea then states that the *French* Government afterwards transferred this overplus to Mr. *Noguera*, who was duly appointed, by the King of *Spain*, to receive the same for the purposes in the said Treaties and Conventions mentioned; and that Mr. *Noguera* afterwards transferred part, but not the whole, of such Funds into the hands of the Defendant, who was appointed by the King of *Spain* to receive them for the same purpose of being applied according to the Treaties and Conventions. The

Plea then states that, at the dates of these Treaties and Conventions, there were and still are Debts due to Individuals and to private Establishments within the meaning of the said Treaties and Conventions, to an amount greater than the said overplus of *Rentes* in the hands of the Defendant and the remainder of the Funds provided for that purpose by the said Treaties and Conventions, will be able to discharge. And the Plea further states that a royal Decree was duly made, by the King of *Spain*, on the 20th of March 1824, appointing the Commissions for the liquidation of the said Claims, which it states to have been interrupted by the unfortunate occurrence of March 1820; and the Plea avers that both the said Commissions are now in a state of activity.

The Plea further avers that the Plaintiff had not, nor has any claim to any portion of the Funds provided under any of the said Treaties and Conventions; and that the Monies in the hands of the Defendant, which are claimed by the Bill, are portion of the overplus of *Rentes* in the said Treaty of the 30th of April 1822 mentioned, or of the proceeds and produce thereof. And the Defendant insists upon the said several Matters in bar to the Discovery and Commissions prayed by the Bill.

The question to be first considered, therefore, is, whether, taking the several Matters stated in this Plea to be true, the Plaintiff, upon the Case made by the Bill, has any Interest in the Funds in the hands of the Defendant.

The Bill represents that these Funds, by virtue of Conventional arrangements between the Governments of *France* and *Spain*, were placed at the order and dis-

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position of the Executive Government of *Spain*, and, by the direction of that Government, came into the hands of the Defendant, to be held by him at the order and disposition of the said Executive Government of *Spain*, as he should, from time to time, be instructed; and that, afterwards, in the year 1823, the Assembly of the *Cortes*, then legally convened, authorized the Executive Government to apply these Funds to the general exigencies of the State, and that, thereupon, the then Minister of Finance in *Spain*, requested the Plaintiff to make certain advances, which were immediately required for the exigencies of the State, upon the credit of these Funds; and that the Plaintiff did, accordingly, make such advances to the amount of 111,566 *l. 12s. 7d.* and received Bills of Exchange to that amount, which were drawn upon the Defendant, by the Treasurer-General of the *Spanish* nation: and the Plaintiff seeks the aid of this Court, to assist him in recovering, from the Defendant, the amount of those Bills.

Now, if the Plea of the Defendant be true, and for the present purpose it must be taken to be so, these Funds were not, by the Treaty between *France* and *Spain*, placed at the order and disposition of the Executive Government of *Spain*, nor did they, by the direction of that Government, come into the hands of the Defendant, to be applied by him, from time to time, as he should be instructed by that Government. But, by the Treaties between *France* and *Spain*, these Funds were raised and paid by *France*, for the special purpose of being applied in satisfaction of the Subjects of *Spain* who were Creditors of *France*, and were no otherwise placed at the order and disposition of the King of *Spain*, than to enable him to provide for

the payment of such Claims, when the amount of them should be respectively liquidated by the Commissioners for that purpose to be appointed. If the King of *Spain*, himself, had attempted, therefore, to divert these Funds from the purpose for which they were advanced by *France*, and to apply them to the general exigencies of his Government, it would have been a direct violation of his engagements with *France*; and, being contrary to the first principles of Equity, his purpose would not have been aided by this Court.

The Cortes cannot, at the utmost, pretend to more than to stand in the place of the King of *Spain*, and, as this Court would not have assisted the Plaintiff in recovering these funds from the Defendant, if the Plaintiff had claimed them, under the order of the King, in repayment of advances made by him for the exigencies of the State, it necessarily follows that he cannot receive the assistance of this Court, claiming them in repayment of such advances, not under the order of the King, but under the order of the Cortes.

The Plaintiff, however, contends that, if he were to admit that his Case is such that he can have no title to be relieved in Equity, yet he is still entitled to the Discovery and Commission, which is all he seeks by this Bill, in aid of his Action at Law; and that the Defendant cannot, by Plea, protect himself from the Discovery. This is surely a singular proposition. For the consequence would be that any person, first suing out a Writ at Law against another, might, by a Bill in Equity for a Discovery, compel such other person to disclose, upon oath, all the particulars of any transaction, however secret and important, with which the Plaintiff had no

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manner of concern, merely by introducing into his Bill the false allegation that he had an interest in the transaction, since, according to the doctrine of the Plaintiff, it would not be permitted to the Defendant to protect himself from such discovery, by proving to the Court the falsehood of the allegation that the Plaintiff had any interest in the transaction.

But the law of the Court, as well as the reason of the thing, is directly the other way ; and a Defendant is entitled to protect himself from a Discovery, by a Plea that the Plaintiff has no interest in the subject of his Suit : and such is the nature of this Plea. This is stated by Lord *Redesdale* (*f*) to be the doctrine of the Court ; and the Case cited by the Plaintiff in support of his proposition, when it is carefully considered, will be found consistent with this doctrine.

I have already stated that the Plea of the Defendant is accompanied by an Answer. The Plaintiff, very properly, waives all objection of form to the Answer ; and I have not, therefore, entered into the consideration of it. The Plea must be allowed.

(*f*) *Treat. Plea.* 228.

1826.
16th & 17th
November.

Will.
Assets.

RHODES v. RUDGE.

THE Reverend J. S. Fermor made his Will, as follows:

"I give and bequeath all my real and personal Estate, whatsoever and wheresoever, unto my friends, *Michael Bray* and *Edward Rudge*, Esquires, their Heirs, Executors, Administrators and Assigns, upon the following Trusts (that is to say), upon Trust, in the first place, to sell and dispose of, as soon as conveniently may be after my decease, my Living of *Crayford*, in the county of *Kent*, and the Money to arise by Sale thereof to go in discharge of my Debts and Legacies, and the Costs and Charges of the Trusts hereby created, and to apply the same accordingly; and, if such Money arising by such Sale as aforesaid, be not sufficient to discharge the said Debts and Legacies as aforesaid, upon further Trust to cause Timber to be felled, on one or all of my said real Estates, to the amount in value of 500*l.*, the same to be applied in discharge of my said Debts and Legacies; and, if the Money arising by Sale of such Timber, should not be fully sufficient to discharge the same, then upon further Trust by Mortgage or Sale, to raise such deficiency, on all or any of my said real Estates, for the purpose of paying off my said Debts and Legacies, and the Costs and Charges of the Trusts hereby created, and to apply the same accordingly: and upon this further Trust, by the ways and means aforesaid, or any of them, to raise and pay the following Legacies, which I give to the Persons, and in manner following, (that is to say), to my dear Mother 300*l.* to my dear Wife, all such Sum and Sums of Money as

Testator gave his real and personal Estate, to Persons whom he afterwards appointed his Executors, in Trust in the first place to sell an *Advowson*, and apply the Proceeds in discharge of his Debts and Legacies, and if they should be insufficient, then to raise the deficiency by Sale or Mortgage of his real Estates, and directed his Executors to retain their Expenses, but did not expressly declare any Trust of his personal Estate. Held that the personal Estate was primarily applicable to the payment of the Testator's Debts.

5 Puffs 32
1 Augt 8*l.* 19.
1. Puff 573.
1. M. & K. 601.
1 M. & K. 600

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shall appear to be due to me, at the time of my decease, in the Books kept by the Governor and Company of the Bank of *England*, and the Interest and Dividends thereof; and also I give and bequeath to my dear Wife all such Money as shall appear due and owing to me, from Messrs. *Child's* and *Co.* Bankers, in *London*: I give to my Uncle, Major *James Boorden*, the Sum of 2,000*l.* to my Godson, *Thomas Weston*, of *Bird's Isle*; in the county of *Kent*, the sum of 200*l.*: to — *Taylor*, daughter of *Jeffery Taylor*, of *Seven Oaks*, aforesaid, apothecary, the Sum of 50*l.*; and to *Mary Pett*, a very faithful servant, who has lived in my family thirty-six years, the sum of 20*l.* payable on the day of my death; and also a clear Annuity of 20*l.* for her life, to be paid half yearly, by equal portions, the first half yearly payment thereof to be made at the end of six months next after my decease; and to each of my servants, who shall be living with me at the time of my death, two years' wages, over and above what shall be due to them, respectively, at the time of my decease: and, upon this further Trust, that the said Trustees, their Heirs, Executors, Administrators and Assigns, do and shall stand seized and possessed of my said real Estates, or so much thereof as shall respectively remain after answering the purposes aforesaid, in Trust, as to the Rents and Profits thereof, for my said Mother and Wife, during their joint lives, in equal portions; and, after the decease of my said Mother, and in case my said Wife shall survive her, then in Trust for my said Wife during her life; but, if my said Wife shall die in the life-time of my said Mother, then, after the decease of my said Wife, in Trust for my said Mother, during her life; and, from and after the decease of my said Mother, then in Trust for *John Austin*, of *Broad-*

Ford or *Seven Oaks* aforesaid, during his natural life; and from and after the decease of the said *John Austin*, then in Trust for my Sister-in-law, the Right honourable *Henrietta Benton*, Spinster, during her life; and, from and after her decease, in Trust for all and every the Child and Children of her Body, to be begotten, who shall live to attain the age of Twenty-one years, in equal portions, if more than one, and, if but one, then to such one Child, and their, his or her respective Heirs, Executors, Administrators and Assigns; and, in case my said Wife shall marry after my decease, and there shall be any Child or Children of her Body begotten, living at the time of her decease, then it is my Will that my said Trustees shall stand seised and possessed of my said real Estates, or so much thereof respectively as shall remain after answering the purposes aforesaid, from and after the decease of the survivor of my said Mother and Wife, subject to and charged with the payment of the sum of 3,000*l.*, which, in that event, I give to my said Sister-in-law *Henrietta Benton* (if she shall be then living) in Trust for all and every the Child and Children of the Body of my said Wife to be begotten, who shall survive her, and shall live to attain the age of Twenty-one years, in equal proportions, if more than one, and, if but one, then to such one Child, and for their, his or her Heirs, Executors, Administrators and Assigns respectively." The Testator then directed that the Receipts of his Trustees should be sufficient discharges for the Money to arise by Mortgage or Sale of his Estates, and then proceeded as follows: "And I do hereby nominate and appoint the said *Michael Bray* and *Edward Rudge* Executors of this my Will; and I order and direct that my said Trustees and Executors, and their Heirs, Executors, Administrators and Assigns,

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shall deduct and retain their respective Costs, Charges and Expenses, and for their trouble in the execution of the Trusts hereby in them reposed, or in relation thereto."

Mr. Horne, Mr. Roupell, and Mr. Wray, for the Plaintiff:—

The Testator did not mean to exonerate his personal Estate; for, in the first place, the real and personal Estates are given to the Executors upon certain Trusts. Nothing is given to them beneficially. Next, the Testator has made no particular disposition of his personal Estate. *Duke of Ancaster v. Mayer (a). Gray v. Minnethorpe (b).*

Mr. Heald, and Mr. Pole, for the Executors:—

The question is, whether the Testator intended his real Estate to be primarily liable to the payment of his Debts and Legacies, not whether he meant to exonerate his personal Estate?

It would be difficult to contend that the Testator meant to exonerate his personal Estate, for the mere purpose of dying intestate as to it. But here he did make a disposition of his personal Estate, under which the Executors are entitled to it beneficially. The Testator declares Trusts of his real Estate, but not of his personal Estate. He merely makes specific Bequests of certain parts of it. The direction that the Executors shall retain their Costs and Expenses can have no effect on the construction of the Will; for the Law would allow them to do so without such a direction. The

(a) 1 Bro. C. C. 454.

(b) 3 Ves. 103.

Case of *Dawson v. Clark* (c) is precisely in point. That Case came before Lord *Elden*, C. upon Appeal, and the decision was affirmed (d). In *Southouse v. Bate* the attention of Sir *W. Grant*, M. R. was again called to it, and his Honor then said that he thought that the Executors, as such, would have been entitled even if they had not taken by the direct Bequest (e). *Bootle v. Blundell* (f). *Coningham v. Mellish* (g). *Paice v. The Archbishop of Canterbury* (h). *Rogers v. Rogers* (i).

The Testator orders his Living at *Crayford* to be sold, *in the first place*. This is a direction to sell it at all events; and the words "in the first place" are quite as strong as the word "fully," which was relied on in *Stephenson v. Heathcote* (k). In speaking of the Money to arise by the sale of the Timber he uses the identical word "fully." He does not say, that if the Money to arise from the sale of the Living and the Timber, together with his personal Estate, shall not be sufficient to discharge his Debts; but if the Money to arise by those means alone shall not be sufficient for that purpose, then his real Estate shall be sold. It is clear, therefore, that he did not intend his personal Estate to be applied in payment of his Debts and Legacies until the Money to arise by sale of his real Estate should be exhausted.

Mr. *Hart* and Sir *George Hampson* for the Executor of the Testator's Mother, who had been in possession of a moiety of the Estates, did not argue the question, as the Plaintiffs waived the taking of the account of the Rents and Profits received by her.

(c) 15 Ves. 409. (d) 18 Ves. 247. (e) 2 V. & B. 399.
 (f) 1 Mer. 193. (g) Prec. Cha. 35. (h) 14 Ves. 364.
 (i) 3 P. W. 193. (k) 1 Mer. 224.

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Mr. *Pechell*, for the Defendant *Henrietta Burton*
the Administratrix of the Testator's Widow:—

The provision in the Will for the payment of the Executors Costs, shows that they were not meant to take the personal Estate beneficially. The sale of the Living is directed to be absolutely made. There is no allusion to any prior Fund. The Testator does not speak of the payment of his Debts as having begun, but as if he was providing an original Fund for that purpose. *Burton v. Knowlton* (*l*). When he speaks of the Proceeds of the sale of the Timber, he speaks conditionally; not as if the payment of his Debts was completed. When he again mentions his Trustees, he adds their Executors, Administrators and Assigns. These words are applicable to personal Estate, and are inconsistent with the notion that he had nothing but real Estate to dispose of. *Hancor v. Abbey* (*m*).

The VICE CHANCELLOR:—

The Bill in this Case is filed for the execution of the Trusts of the Will of the Reverend *J. Shirley Fermor*: and the single question in the Cause is, whether the personal Estate of this Testator, not specifically bequeathed, is exempt from the payment of his Debts and pecuniary Legacies?

1826 & K 19 It has long been the settled rule of Courts of Equity, that the direction of the Testator to sell or mortgage his real Estate for the payment of his Debts and Legacies, is not alone evidence of the intention of the Testator that the personal Estate should be exempt from those Charges, and amounts only to a declaration that

the real Estate shall be so applied to the extent in which the personal Estate, which, by law, is the primary Fund, shall be insufficient for those purposes. In order to exempt the personal Estate, there must be found in a Will, either express declarations to that effect, or provisions from which such intention of exemption is to be inferred. In this, as in all other cases of inference or implication, except necessary or logical implication, there may be a difference of opinion between Judges who are called to consider the case. The duty of each Judge, after full consideration, is to declare his own opinion. This Testator begins his Will by giving all his real and personal Estate to his friends *Michael Bray* and *Edward Rudge*, their Heirs, Executors, Administrators and Assigns, upon the following Trusts (that is to say) upon trust, in the first place, as soon as conveniently may be after his decease, to sell and dispose of his Living at *Crayford*, and all the Money to arise by sale thereof to go in discharge of his Debts and Legacies, and the Costs and Charges of the Trusts thereby created; and, if such Money be not sufficient to discharge the said Debts and Legacies, then he authorizes his Trustees to fell Timber on his other real-Estate, to the value of 500*l.*, for those purposes, and, if such sum of 500*l.* be not sufficient to pay his Debts and Legacies and the Costs and Charges of the Trusts, then to raise the deficiency by sale or mortgage of any of his real Estates. He then proceeds to give certain Legacies, and afterwards to dispose of the residue of his real Estate, and appoints his Trustees, *M. Bray* and *E. Rudge*, to be his Executors, with a direction that his said Trustees and Executors should deduct and retain their respective Costs, Charges and Expenses, and for their trouble in the execution of the Trusts thereby in them

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reposed, and in relation thereto, without naming out of what Fund.

It is argued, for the Trustees and Executors, that the first gift of the personal Estate to them, though expressly declared to be upon Trust, is nevertheless a gift to them, for their personal benefit, because the gift to them is not, as Executors, but as Trustees, and is to be construed as if it were given to Trustees who were not Executors; and that then, according to the Case of *Dawson v. Clark*, the personal Estate would vest in them, subject only to the Trusts which the Testator should declare in his Will; and that, having declared no Trusts in his Will as to the personal Estate, the whole personal Estate belonged beneficially to the Trustees, though Executors also. If it were admitted that this Case was within the authority of *Dawson v. Clark*, and that the personal Estate were beneficially given to the Trustees, though Executors, the question would still remain whether it was more than a gift of the residue of the personal Estate, and whether, in their hands, the personal Estate was not primarily applicable to the payment of Debts and Legacies? But, upon a careful perusal of the Case of *Dawson v. Clark*, the residuary personal Estate was held to vest beneficially in Trustees, who were afterwards named Executors in the Will, because the words of the gift were to them upon Trust, in the first place, to pay and charged and chargeable with all his just Debts and Funeral Expenses, and that the Trust was not general, but was qualified by the words "charged and chargeable," so as to extend to the amount of the Charges only; and that no Trust was applied to the Surplus after satisfaction of the Charge; and it was clearly Lord *Eldon*'s opinion that, if the gift

had been to the Executors, *eo nomine*, by the same words, they would equally have been entitled to the Surplus. In the present Case there is no such qualification of the Trust; but the whole real and personal Estate is expressed to be given, generally, upon the Trusts which follow. The Case of *Dawson v. Clark* is not, therefore, applicable here. The direction in this Will that the Trustees and Executors should deduct and retain for their respective Costs, Charges and Expenses, and for their trouble in the execution of the Trusts, affords a conclusive inference that it was not the intention of the Testator that they should take any beneficial Interest: and, upon the whole, I am of opinion that, in this Will, there is no beneficial gift of the personal Estate.

If there be no gift of the personal Estate except the gift to the Trustees upon the Trusts which follow in the Will, then there is nothing in the Will which can be treated as evidence of the intention of the Testator that the personal Estate should be exempt from the payment of Debts and Legacies, other than that the Testator has not added, to the charge of the real Estate for that purpose, that it should only be in aid of his personal Estate, and that the Testator begins the declaration of Trust by directing the Trustees, in the first place, as soon as conveniently might be after his decease, to sell his Living at *Crayford*, and to apply the produce in discharge of his Debts and Legacies. With respect to the first point, it is to be observed that the rule of the law directs the primary application of the personal Estate, and such declaration of the Testator to that effect is not necessary. And, with respect to the second point, if it be supposed that this Testator considered his personal Estate not specifically bequeathed as of inconsi-

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derable amount, and that, at all events, the produce of his Living would be required for the payment of his Debts and Legacies, it would sufficiently account for the form of this expression ; and although, on account of the uncertainty of the amount of the personal Estate of a Testator at the time of his death, it is not safe to aid the construction of a Will by evidence of the amount at the time of making his Will, yet such an assumption may fairly be made in reasoning in aid of the intention, as it is to be collected from all the parts of the Will. My conclusion is, that the real and personal Estate, being both given, generally, to the Trustees upon the Trusts declared in the Will, and there being no Trust declared in the Will to which the personal Estate can be applicable, except the payment of Debts and Legacies, and the Testator not having prescribed, as between the real and personal Estate, the order of payment, the rule of law must govern the application, and the personal Estate must be primarily applied. Let it be declared, therefore, that this Testator's personal Estate, not specifically bequeathed, was first applicable to the payment of his Funeral Expenses, Debts and Legacies.

MADDEFORD v. AUSTWICK. (*)

AUSTWICK v. MADDEFORD.

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19th and 20th
November,Agreement.—
Fraud.

THE Original Bill was filed to set aside an Agreement made by the Plaintiff with the Defendant, his Co-partner, for the sale of his Share of the Partnership Business. The Cross Bill sought to enforce the Agreement.

The Pleadings and Evidence were very voluminous; but the substance of them is so fully contained in the Judgment, that no other statement is necessary.

Mr. Heald, Mr. Sugden, and Mr. Cooper, for the Plaintiff in the Original Bill.

Mr. Hart, and Mr. Barber, for the Defendant.

The VICE CHANCELLOR:—

On the 20th of June 1816, the Plaintiff *Maddeford* and the Defendant, with certain other Persons, entered into an Agreement with Mr. *Russell*, who had, for some years, carried on the business of a common Carrier from *London* to *Falmouth* and from *Falmouth* to *London*, to purchase that Business upon certain terms, the particulars of which are not material to the present question.

The several Purchasers agreed, among themselves, to divide the Road from *London* to *Falmouth* between them; and the Plaintiff and Defendant, as Partners,

A Partner, who superintended, exclusively, the Accounts of the Concern, agreed to purchase his Co-partner's share of the Business, for a Sum which he knew, from Accounts in his possession, but which he concealed from his Co-partner, was an inadequate consideration: the Agreement was set aside.

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engaged to work the Waggon to *Worting*, and from *Worting* to *London*. Each Concern was, separately, to be at certain Expenses upon their own line of Road, and were to receive, for their separate Profit, the Bookage, Cartage, Porterage, and other matters of that nature. Other Expenses were to be provided for out of the common Stock, and all other receipts were to be carried into the common Stock; and ultimately divided in certain agreed proportions, the whole line of Road being considered as divided into 281 parts, and the Plaintiff and Defendant being to receive 53 of those parts.

It is proved, in the Cause, that the Plaintiff was wholly employed in the out-door Business of the Partnership Concern; that is, in buying and selling Horses, and in the purchase of Horse Provisions, and other matters of that nature; and that the Defendant was principally employed in the in-door Business, and, especially, in keeping the Accounts, and in the superintendence of the Clerks who were employed for that purpose.

The Partnership proceeded, without any settlement of Accounts, until the month of April 1817; the Plaintiff, from time to time, drawing out Monies from the Concern for his private and separate use, as he had occasion for them; and having, up to that time, drawn out Sums amounting, altogether, to upwards of 1,400*l.* In that month of April 1817, a written Agreement was come to between the Plaintiff and Defendant, whereby the Plaintiff agreed to accept a Sum of 1,000*l.* in addition to the Monies which he had drawn out, in full for his shares of the Profits of the Partnership Con-

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cern up to the end of the year 1817; and the Plaintiff further agreed to accept a Sum of 900*l.* a year, for his future share of the Profits for the next three years.

This Agreement was carried into effect; and the Plaintiff received the 1,000*l.* as an immediate payment, and afterwards duly received the 900*l.* for the three ensuing years.

At the end of the three years a further Agreement was come to between the Plaintiff and Defendant, whereby the Plaintiff was to become the Purchaser of the Partnership Concern, upon the terms therein stated, and possession of the Partnership Property was, accordingly, given up by the Defendant to the Plaintiff, who has since carried on the Business on his own account. But no Deed has yet been executed, to give effect to this latter Agreement. A Deed for that purpose was prepared; but the Plaintiff having expressed his dissatisfaction at the Agreement made in April 1817, and having insisted that he had been unfairly dealt with in that Agreement, the Defendant refused to execute the Deed of dissolution of the Partnership, and assignment of the Partnership Business to the Plaintiff, unless the Plaintiff would, at the same time, give to the Defendant a general Release, which the Plaintiff refused to do.

The Original Bill here is filed by the Plaintiff, for the purpose of avoiding the Agreement of April 1817, and for an account of the actual Profits made in the Concern, from the commencement until its dissolution in 1821, and for payment to the Plaintiff of a moiety of those Profits, after allowing credit for the Monies

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already received by him, and also for the execution of a Deed to give effect to the Agreement of 1821.

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The Cross Bill is filed, by the Defendant in the original Suit, for the purpose of having the original Agreement of April 1817 confirmed; and for the execution of the Deed of dissolution and assignment of the Partnership Property to the Plaintiff, about which there is no dispute between the Parties.

The Plaintiff *Maddeford* seeks to avoid the Agreement of 1817, upon the ground of fraudulent misrepresentation by the Defendant *Austwick*; but there is no direct proof of any misrepresentation. It is, however, to be inferred, that the Defendant *Austwick* must have stated to the Plaintiff, that the terms proposed by him were a fair consideration. That the proposal for such an Agreement originated with the Defendant *Austwick*, is proved by his letter of the 11th February 1817. That the public books of account belonging to the Concern, to which all parties had access, were of an intricate nature, and required considerable experience and attention to understand and make them out, is proved by the book-keeper, *Chase*. That the Plaintiff is not conversant with accounts, is proved by the same Mr. *Chase*, and also by Mr. *Wright*. The particular nature of all these public books has not been explained to the Court; but it is clear they did not contain any statement of an account between the Plaintiff and Defendant.

At the time the Agreement was entered into between the Plaintiff and the Defendant, the Defendant had in his possession a private book, which did contain a statement of the accounts between the Plaintiff and the Defendant, made out by the Defendant, whereby it appeared that the 1,000*l.*, which the Defendant agreed

to pay to the Plaintiff in addition to the Monies which he had drawn from the Concern, would have been nearly but not quite, a fair consideration, if no Profits had been made from the concern of the Mint; but that, taking the Mint Profits into the account, which the Defendant was unquestionably bound to divide with the Plaintiff, it would be many hundred pounds less than the Plaintiff would be entitled to receive.

The Defendant, being the Partner whose business it was to keep the Accounts of the Concern, could not, in fairness, deal with the Plaintiff for his share of the Profits of the Concern, without putting him into possession of all the information which he himself had with respect to the state of the Accounts between them. The Defendant knew, from the Account in his possession, that the 1,000*l.* was not an adequate consideration for the Plaintiff's share of Profits; and he cannot be permitted, in a Court of Equity, to maintain advantage which he has gained over the Plaintiff's ignorance; and the Plaintiff, for that reason, appears to me to be entitled to avoid the Agreement of 1817. The supposed account of the Profits of the Concern, up to the end of 1817, necessarily formed the basis of the Plaintiff's calculation of Profits for the ensuing three years; and, being misled in that respect, he is entitled to avoid the whole Agreement, and to have an account of the Profits of the Concern up to the dissolution in 1821.

The Defendant's argument of confirmation of the Agreement by the subsequent conduct of the Plaintiff, fails altogether; it not being pretended that, at the time of such acts on the part of the Plaintiff, he was aware of the advantage which the Defendant had gained over him.

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THE COLOMBIAN GOVERNMENT (*)

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22d November.

J. B. Rothschild ROTHSCHILD.

Jurisdiction.
Foreign States.

A Foreign State may sue in this Court; but where a Bill was filed by "The Government of the State of *Colombia* and Don *M. J. Hurtado*, a Citizen of that State, and Minister Plenipotentiary from the same to the Court of His Britannic Majesty, and now residing at 33, *Baker-street, Portman-square*, in the County of *Middlesex*," a general Demurrer was allowed to the Bill, because the description of the Plaintiffs did not enable the Defendants to know upon whom Process was to be served, in case a Cross

THE Bill Commenced as follows: "Complaining, show unto your Lordship, the Government of the State of *Colombia*, and his Excellency *Don Manuel Jose Hurtado*, a Citizen of the said State, and Minister Plenipotentiary from the same to the Court of His Britannic Majesty, now residing at No. 33, *Baker-street, Portman-square*, in the parish of *Mary-le-bone*, in the County of *Middlesex*." It stated that the Senate and House of Representatives of the State of *Colombia* having, on the 30th of June 1823, decreed that a Loan to the extent of Thirty Millions of hard Dollars, being about 7,500,000 £. sterling, should be raised upon the credit, and for the service of that State, *Manuel Antonio Arrubla* and *Francisco Montoya*, Citizens of that State, were, under the Decree, appointed Commissioners of the State for raising the Loan, with the most ample powers and authorities to negotiate and contract for it on such terms as might seem to them most advantageous to the State, and to pledge, for the redemption of the Principal and payment of the Interest, the Branches of the Revenue of that State, appropriated for that purpose by the Decree: that the Commissioners, in pursuance of the powers and authorities so given to them, in April 1824 entered into

Bill were filed. in 2 Sum 103.

Sedesda v. Lynde; 9. *Bea* 461.

The Emperor of Austria v. Roseau 3 D. T. & J. 223.

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a Negotiation with *Lyon Abraham Goldschmidt*, since deceased, and *Maurice Jacob Hertz*, then carrying on business under the Firm of *B. A. Goldschmidt and Co.* for raising a Loan of 4,750,000*l.* sterling, on the credit and for the service of the State of *Colombia*; and that Messrs. *Lyon Abraham Goldschmidt* and *Maurice Jacob Hertz*, having agreed to be employed in raising it, a memorandum of Agreement, dated the 14th of April 1824, was executed, by or on behalf of *Arrubla* and *Montoya*, of the one part, and Messrs. *Goldschmidt and Co.* of the other part; and that in pursuance of a Stipulation contained in that memorandum, a complete Agreement, in writing, dated the 15th of May 1824, and made between *Arrubla* and *Montoya*, on behalf of the Government of *Colombia*, of the one part, and Messrs. *B. A. Goldschmidt and Co.* of the other part, was prepared and executed, and thereby *Arrubla* and *Montoya* engaged, on the part of the Government of *Colombia*, to grant a general Mortgage-bond for 4,750,000*l.* sterling, and to deliver to *Goldschmidt and Co.* in a proper state for circulation, 23,150 Certificates, which were to be signed by the Plaintiff *Hurtado*: that the Mortgage-bond should be considered as an absolute, inviolable and indestructible Pledge, Mortgage and Security on all the Revenues of the State of *Colombia*, present and future: that all Monies, the proceeds of the Loan, should be placed at the disposal of *Hurtado*, and that his Receipts should be a full discharge to *Goldschmidt and Co.*; and all arrangements which *Goldschmidt and Co.* might make with him respecting the execution of the Agreement, or any other matters or things proceeding from or connected with the Loan, were thereby approved of, by *Arrubla* and *Montoya*, in the name and on the behalf of the State; and *Arrubla* and *Montoya* did thereby, as Agents

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of the State, and by virtue of the Decree and of the Powers and Authorities vested in them, bind the State of *Colombia*, and all the public Authorities thereof, which did then or might thereafter exist, to perform faithfully and truly all the therein foregoing Engagements and Conditions.

The Bill then stated that the Senate and House of Representatives of *Colombia*, by a Decree dated the 1st of May 1825, ratified this Agreement, and that it was immediately after its execution carried into effect; that *Hurtado* advanced and paid to *Goldschmidt and Co.* on the account and to the credit of the Government of *Colombia*, 57,000*l.* sterling on the 1st of May 1824, 41,000*l.* sterling in June 1824, and 20,927*l.* 2*s.* 5*d.* on the 29th of July 1825; and that *Goldschmidt and Co.* did, at divers times during the years 1824 and 1825, on the application and under the sanction of *Hurtado*, as the Representative of the State of *Colombia*, purchase and ship, for the use, and on the account and at the risk of the Government of that State, considerable quantities of Shot, Muskets, Gunpowder and other military Stores, and also of Doubloons, Dollars, Gold Bullion, Silver Bullion and other Treasure, all which Stores and Treasure were consigned to the Agent for the time being of that State at *Carthagena*, or elsewhere in *South America*; and, on occasion of such Shipments being made, the Bills of Lading and Invoices of the Articles so shipped, were handed to *Hurtado*, by *Goldschmidt and Co.* who placed the costs of these Articles, and the amount of the charges of purchasing and shipping the same, to the debit of the Government of *Colombia*, against the proceeds of the Loan; and that *Goldschmidt and Co.* did also, on the credit of the coming proceeds

of the Loan, from time to time pay Drafts or Bills of Exchange drawn, by the Minister of Finance of the State of *Colombia*, on *Hurtado*, and which were by him made payable at the House of *Goldschmidt and Co.* and debited the Government of *Colombia* with the amount of the Payments; and that they also, during and since the year 1825, from time to time, in compliance with the stipulations in the Agreement of the 15th of May 1824, and by the directions of *Hurtado*, purchased up a considerable number of the Certificates issued in respect of the Loan, for the Sinking Fund of the Loan, and, with the amount of the purchase-money paid by them for these Certificates, and of the costs of brokerage for the purchase thereof, they debited the Government of *Colombia* against the proceeds of the Loan; and that, by these dealings and transactions between *B. A. Goldschmidt and Co.* and the Government of *Colombia*, there subsisted an Account between them which had never been settled.

The Bill prayed that an account might be taken of all Sums received by *Goldschmidt and Co.* for or on account of the Government of *Colombia*, and of all Sums paid and expended by them unto or for the use of the Government; and that what, on the balance of such Accounts, should appear to be due and owing from the Firm might be paid to *Hurtado*, as the Representative of the *Colombian* Government.

To this Bill the Defendants demurred for want of Equity.—

The *Attorney-General*, and *Mr. Pemberton*, for the Demurrer:—

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No persons appear before the Court in a character which enables them to sustain this Bill. The Plaintiffs are described as the Government of the State of *Columbia*, and *Don Manuel Jose Hurtado* joins as a Citizen of that State.

There is no mutuality in this Case. For suppose it were necessary for the Defendants to file a Cross Bill, how are the Plaintiffs in this Bill to be described when made Defendants? How is a subpoena to issue against them? Would it be sufficient to have a subpoena against *Don Jose Hurtado*? Certainly not; for it has been decided that an Ambassador does not represent his Government in a Court of Justice. So far, therefore, as relates to what is called the State of *Colombia*, *Hurtado* has no right to sue, nor can he be sued. Even if it were admitted that a Foreign State can sue in Equity, surely there must be some mode of enforcing a cross equity against it. It is, however, doubtful whether a Foreign State can sue in a Court of Equity. From the books it appears that the King of *Spain* has been allowed to bring an Action at Law. But the remedies and the forms of process in a Court of Equity, make it much more difficult to show how a Foreign State can maintain a Suit to enforce an equitable demand. At Law there are no cross equities or cross claims. But where an account is to be taken, or an agreement to be performed and enforced by the process of a Court of Equity, it is not easy to see how it can be done. Suppose, on taking an account at the Suit of a Foreign State, the balance is found to be against the Plaintiffs, in what manner can the payment of that balance be enforced? In the Case of the *Nabob of the Carnatic v. The East-*

India Company (a), an Anecdote is mentioned of the King of Spain being, by the advice of *Selden*, outlawed to prevent his bringing an Action. But how could the State of *Colombia* be outlawed? If a Court of Equity is to entertain a Suit at all, it must see that it can enforce justice, as well on behalf of the Defendant as of the Plaintiff. This Bill, indeed, charges that *Hurtado*, the Co-plaintiff, has been the Agent of the State, and is the proper person to receive what is claimed to be due to the State. But that, instead of a reason why he should be a Plaintiff in such a Bill, is a sufficient reason why he should not. Nor indeed does he submit by the Bill, as every accounting Party ought to do, to pay the balance if any should be found due from him on taking the account. It is, however, of great importance to observe that, in 1824, at the time when the transaction took place in respect of which relief is sought by the Bill, there was no such State in existence—no body of persons who had any right, in this country, to assume to themselves the Title which is now assumed by the Plaintiffs in this Bill. It was not till 1825 that the State of *Colombia* was recognized by the Government of this Country.

Another question, therefore, arises upon this Bill, whether it is competent to the Subjects of this Country to treat with a Foreign Government not recognized by the Government of this Country? That question came before the *Lord Chancellor* in the case of the *Peruvian* Loan, *Jones v. Del Rio* *. In that case it appeared that

(a) 1 Ves. jun. 371. See 366, n. S. C. 3 Bro. C. C. 292; 4 Bro. C. C. 180; and 2 Ves. jun. 56.

* Not yet reported. *Turn 291.*

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the *Peruvian* Government, which is recognized by this Country, contracted with Mr. *Kinder* for raising a Loan, to be secured on the Revenue of that Government. Some of the Parties who advanced Money on that Loan became greatly dissatisfied with the transaction, and a Bill was, therefore, filed against *Kinder*, *Everett* and other persons concerned in it. On an application to the Court, after that Bill was filed, the *Lord Chancellor* suggested the objection as to how he could recognize such a transaction with a Government not recognized by this Country; and whether transactions of such a nature might not create an interest adverse to the public interest of the British Nation. That objection was not very palatable to any of the Parties concerned in the Case; but the *Lord-Chancellor* insisted on its being argued. In the course of the Argument, the *Lord Chancellor* made many very strong observations, which showed an opinion that such transactions could not be recognized in a Court of Justice. The case was, however, ultimately decided on the ground that, as the Plaintiffs sued on behalf of themselves and others, though the Plaintiffs wished to annul the Contract which was the subject of the Suit, yet the other Parties might not wish to do so; and on that ground his Lordship dissolved the Injunction. In the present Case, the subsequent recognition of the State of *Colombia* by the Government of this Country, could have no effect as to the antecedent transaction which is now brought in question; for, although the Crown has the right to bind the Country by Treaty with a Foreign State, that Treaty does not affect the rights and claims of individuals, unless there be some express stipulation on the subject.

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Mr. Sugden, Mr. Pepys, and Mr. R. Grant, for the Bill:—

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1. Assuming that the State of *Colombia* was not recognized by the Government of this Country at the time when the Agreement was made, it cannot be disputed that, soon afterwards, and before the Bill was filed, it was solemnly recognized by the *British Government*. On the 18th of April 1825, that recognition took place, and, from that time forward, the State of *Colombia* became invested with all the rights of other independent States, and, as such, can sue and be sued in this Country. By a Decree of the State of *Colombia*, made after the recognition by this Country, that State has acceded to the Agreement which is the subject of this Bill.

2. As to the right of a Sovereign State to sue in this Country, there can be no doubt what the usage has been in this respect. There are many Bills now on the files of this Court, in which the King of *Spain* is Plaintiff. In a recent Case, the *King of Spain v. Mendizábel*, the *Lord Chancellor* made an order restraining the Defendant from bringing an Action at Law; but it did not occur to any one that it was possible to prevent the Plaintiff from having relief in the character of a Sovereign Prince. There is no authority against it. This Case is not to be put on what or how many the individuals are, who constituted the Government of *Colombia*. Any Sovereign or State which is known and recognized by a general appellation, may sue, as such, under that appellation. No man can deny that, at the date of the Agreement, the State of *Colombia*, though not recognized by this Country, was in existence, and, therefore, it was capable, by the Law of Nations, of being a party to a contract. It might be capable of contracting, and

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3. *Don M. J. Hurtudo*, who joins as a Plaintiff in this Suit, states himself to be a Citizen and Plenipotentiary of the State of *Colombia*; and also describes himself as an Individual residing in a particular Street in *London*. He is so described also in the Agreement, and that description gives him, as an Individual, all the powers necessary to enable him to maintain this Suit alone. There can be no doubt that he, at least, has

(a) Lib. 1. c. 1, sec. 4.

full authority to file this Bill. The Monies in question never found their way directly to the State of *Colombia*, but to *Hurtado*; and, on the faith of the Agreement, he has paid large Sums of Money to the Defendants. Therefore, if the Court should be of opinion that the Government of *Colombia*, as a Government, cannot sue in this case, still there is before the Court a Plaintiff entitled to sue on the rights which he has acquired under the contract.

4. As to the objection that the Bill, being for an account, does not contain any offer to pay the balance if found against the Plaintiff, such an offer is not now considered necessary. The mere filing of a Bill for an account enables the Court to do all justice between the parties.

(The Vice-Chancellor said that the Court had originally required that a Bill for an account should contain an offer on the part of the Plaintiff to pay the balance if found against him; but that was not now considered necessary.)

Mr. *Hart*, Mr. *Horne*, and Mr. *Collinson*, appeared for other Defendants, but were not called upon to argue the Case.

The VICE-CHANCELLOR:—

It does not appear to me to be necessary to notice the several objections which have been made to this Bill*.

* These objections were, that the Agreement was usurious, and that as no relief was prayed against the defendant Rothschild, the Demurrer was at all events good as to him.

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It is not now necessary that a Bill for an account should contain an offer by the Plaintiff to pay the Balance if found against him.

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A Foreign State is as well entitled, as any Individual, to the aid of this Court in the assertion of its rights : but it must sue in a Form which makes it possible for this Court to do justice to the Defendants. It must sue in the Names of some public Officers who are entitled to represent the interests of the State, and upon whom Process can be served on the part of the Defendants ; and who can be called upon to answer the Cross Bill of the Defendants. This general description of "The *Colombian Government*," precludes the Defendants from these just rights ; and no instance can be stated in which this Court has entertained the Suit of a Foreign State by such a description.

Demurrer allowed.

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v.

THE EARL OF LONSDALE. (*)

1827.
25th January.Charity.
Election.

THE Information prayed that a School might be endowed and established pursuant to the Trusts declared by *John Lord Viscount Lonsdale*, by certain Indentures dated the 4th and 5th of May 1697, and by his Will. The Defendants were the present Earl of *Lonsdale*, and several members of his Family, who claimed to be entitled, in remainder, under the family Settlements, to the Estates in question.

By the Indentures of May 1697, after reciting that *John Lord Viscount Lonsdale* designed to found and settle, at *Lowther* in the County of *Westmorland*, a School of Learning, for the education of Gentlemen's Sons there; and, to that purpose, in the town of *Lowther* had erected and built from the ground a large and fair House, wherein the said School should be kept, and they taught and educated accordingly; and, for continuance and support thereof, had resolved to settle a competent revenue, whereby and out of which, such Masters, and other Persons there to be placed, or employed to keep, teach, and manage the School, might have proper salaries for their labour and maintenance, and that the School might be continued and kept, and Gentlemen's Sons therein educated and taught, from thenceforth for ever thereafter, *John Viscount Lonsdale*

part of the Founder's family Estate, of which he was Tenant for Life only, the Court referred it to the Master to settle a Scheme for the benefit of the County of *W.* and the Parish of *L.* especially.

To raise a case of Election there must be a Form of a Gift as to the property which the Donor had no power to dispose of.

Nightingale v. Saltoun. 5. June 494 2 R. 574

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conveyed to thirteen Trustees, the Manor of *Darnbrooke* in the County of *York*, and all his Lands and Hereditaments in *Darnbrooke*, and the impropriate Rectory of *Hale*, in *Cumberland*, and a Farm called *Armstrong's* Tenement, in the Parish of *Kirklevington*, in *Cumberland*, and all that the School-house lately erected by him at or in the Town of *Lowther*, with the soil and ground whereon the same stood, to hold the same unto the Trustees, their Heirs and Assigns for ever, upon trust to permit him to make Leases, for twenty-one years, or any other term, of the Manor and Premises, and to receive the Rents and Profits thereof for the good of the School, for his natural life, and, after his decease, out of the Rents and Profits to pay, yearly, for ever, such salaries or sums of Money, to such Masters, and other Persons there to be placed, or employed to keep, teach, and manage the School, in such proportions, at such times, in such manner, and under such conditions and terms as he should at any time thereafter, by any writing under his hand and seal, to be attested by three or more credible witnesses, appoint or declare, and to employ and bestow the residue of the Rents and Profits from time to time in and about the necessary repairs of the School-house, and other incidental charges.

John Viscount Lonsdale afterwards made his Will, dated the 16th of September 1698, and thereby gave to his Executors, their Heirs or Assigns, the Manor of *Darnbrooke*, and all his Messuages, Lands, Tenements, and Hereditaments in *Darnbrooke* (excepting the Mines of Lead, Coal, and all other Minerals, Royalties, and Franchises within the Manor,) and also his Rectory and Parsonage of the Parish of *Hale* in *Cumberland*, and his proportional part or share of the Tithes of the Territories, Village, or Hamlet of *Brisco*, in the Parish of

Saint John in Cumberland, theretofore had and enjoyed, together with the Rectory of *Hale*, in trust to be a fund, or to employ and dispose of the Rents and Profits thereof for the maintenance and salary of the Schoolmasters of the Free-school for which he had erected a House in *Lowther*, and for the management of the same, and upon such trust and for such purpose to settle the Manor and Premises upon Trustees, in such manner, and under such laws, statutes and constitutions, as to his Executors should seem meet and expedient; or otherwise upon such trusts, and for such other purposes as his Executors should think most conducing to the good of the County of *Westmoreland*, and, especially of the Parish of *Lowther*: and he devised divers Manors and Estates to such persons of his name and blood as would become entitled, under the Settlement, to the Estates therein mentioned: and he appointed three of the thirteen Trustees and two other persons his Executors.

Although *John Viscount Lonsdale* had power to dispose of the Manor and other Premises with which the School was meant to be endowed, the School-house was built on part of the family Estate, of which he was Tenant for Life only. The School was, nevertheless, established therein in his life-time, and was continued for about forty years, when the first Tenant in tail under the family Settlement coming into possession of the Estate, suffered a recovery, and thereupon, discontinued the School, and it has ever since ceased, and the Rents and Profits of the Premises with which it was intended to be endowed, have been enjoyed by the *Lowther* family, and, when the Information was filed, were received by the Defendant, the Earl of *Lonsdale*.

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Mr. *Attorney-General* and Mr. *Pemberton* for the Information, insisted that the Trusts of the Deed of May 1697 ought to be established ; or if they had failed because *John Lord Viscount Lonsdale* had no power to dispose of the School-house, then that the Trusts of the Will ought to be carried into execution : that, as the Will gave large benefits to the Defendants who now claimed the School-house under the family Settlement, they were bound, on the principle of election, either to renounce those benefits, or to confirm the intention of *John Viscount Lonsdale* as to the School-house : that there was, at any rate, a clear, general devise for charitable purposes ; as schools of learning were expressly mentioned in the statute of charitable uses.

Mr. *Hart*, Mr. *Shadwell* and Mr. *Wray*, for the Defendants :—

It is clear that the Trusts of the Deed of 1697 cannot be established ; 1st. because the School, being for the education of Gentlemen's Sons, is not a Charity : 2dly, because the purpose was to found the particular School in the Parish of *Lowther* ; and, as that cannot be carried into effect, because *John Viscount Lonsdale* had no power to dispose of the School-house, the gift must wholly fail. The Charity intended by the Will, must also fail, for the same reasons. Those who claim under the family Settlement, are not bound, by way of election, to devote the School-house according to the intention of *John Viscount Lonsdale* ; because there is not, in the Will, any gift of the School-house to the Trustees of the School. The words of gift for general charitable purposes, are too vague to have effect as a good devise for a Charity. But, even if it were not so, effect could not be given to them on this Information,

which does not extend to establish the Trusts of the Will. This is one of those Cases in which, on the principles stated by Lord *Hardwicke*, in *Bor v. Bor* (a) the doctrine of election does not at all apply.

The VICE-CHANCELLOR :—

The institution of a School for the Sons of Gentlemen, is not, in popular language, a Charity ; but, in the view of the statute of *Elizabeth*, all schools for learning are so to be considered ; and on that ground no objection can be made to the Trusts of the Deed of 1697.

But the purpose of that Deed being to found the School in the particular School-house in the Parish of *Lowther*, which cannot be effected because *John Viscount Lonsdale* had no power to dispose of that School-house, it appears to me that the Trusts of that Deed must altogether fail.

I think the Trusts of the Will as to that School must fail for the same reason ; there being no gift of the School-house to the Trustees of the Charity, so as to bind those who claim under the family Settlement, by way of election.

It may be collected, from the Will, that he had an intention to give the School-house to the Trustees of the Charity. But there is no authority for stating that a party is put to his election, under a Will, unless, in the Will, there be the form of a gift as to the property which is to pass by election.

(a) 3 Bro. P. C. 178.

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The Will, after directing the Rents and Profits of the Manor, Lands and Rectory in question to be applied, for the purposes of the School, as to his Executors shall seem meet and expedient, adds the words following: “ or otherwise upon such other Trusts or for such other purposes as my said Executors shall think most conducing to the good of the County of *Westmorland*, and especially of the Parish of *Lowther*;” this amounts to a clear direction that, if, for any reason, the Testator’s intention as to the School should fail, the Manor, Lands and Rectory intended for the endowment of the School, should be applied to other charitable purposes: and the Court is bound to carry this intention into effect.

Declare, therefore, that the Trust created by *John Viscount Lonsdale* as to the School at *Lowther*, has failed, by reason that he had not power to dispose of the particular School-house; but that the Manor and Lands of *Darnbrooke*, and the Rectory and Parsonage of *Hale*, with the Glebe Lands and Tithes thereunto belonging, and the proportional part or share of the Testator in the Tithes or Tenths of *Brisco*, within the Parish of *Saint John*, in the County of *Cumberland*, heretofore had and enjoyed with the Rectory of *Hale*, are well given, by the Will of the said *John Viscount Lonsdale*, to charitable uses; and refer it to the *Master* to inquire of what particulars the Property now consists, and in whose occupation and possession the same now are, and under what circumstances, and what is now the Rent or annual Value thereof, and of every part thereof, and in whom the legal estate is now vested: and declare that the Defendant, the Earl of *Lonsdale*, is to account for the amount of the Rents and Profits of the said several Premises which have been received by him, or

to his use, from the commencement of the term of Six Years before the filing of this Information; and let the *Master* take such Account accordingly; and let the *Master* settle a Scheme, for the application of the Rents and Profits of the said several Premises to some charitable purpose or purposes conducing to the good of the County of *Westmorland*, and, especially, of the Parish of *Lowther*, and for the future trusts and management thereof: and let the *Master* tax the Costs of the Informant, the *Attorney-General*, to the hearing; and let the same, when taxed, be paid by the Defendant the Earl of *Lonsdale*: and reserve the consideration of all further Directions and subsequent Costs, and the extra Costs of the Informant, until after the *Master* shall have made his Report.

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HARRIS v. KEMBLE.

12th April.

THE facts in this Case are stated in the Judgment, it is unnecessary to report them in the usual manner.

Mr. Sugden and Mr. James appeared for the Plaintiff; Mr. Heald, Mr. Twiss and Mr. L. Lowndes, for the Defendants, Kemble, Willett and Forbes; Mr. Shadwell, for the Defendants, Harrison and Trotter; and Mr. Hart and Mr. Rawlins, for the Defendant Const.

The Judgment was as follows:

with reference to accounts which were equally open to both Parties, and if the representations be justified by those accounts.

Rawlins v. Wickham 3 Sept. V. J. 319.

ante 18 - '23.
1 mo & 9 d. 207.

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The VICE-CHANCELLOR:—

In the month of March 1822, the Plaintiff, *H. Harris*, was entitled to fourteen twenty-fourth Shares of the property of Covent Garden Theatre. The Defendants, *Kemble*, *Willet* and *Forbes*, were then entitled, together, to seven twenty-fourth Shares, and the Defendant, *Const*, was then entitled, for life, to the remaining three twenty-fourth Shares; and the reversion of these three twenty-fourths was then vested in persons claiming under the Will of Mrs. *Martindale*, to whom the Defendant, *Const*, was Executor. On the 11th of March 1822, the Plaintiff, *Harris*, and the Defendants, *Kemble*, *Willet* and *Forbes*, entered into the Agreement which is the subject of this Suit. And the effect of this Agreement is, that the Defendants, *Kemble*, *Willet* and *Forbes*, as between themselves and the Plaintiff, should be considered as the Lessees of the Theatre, for a term of ten years, to be computed, retrospectively, from the 1st of August 1821, at a Rent of 12,000*l.*, which would, in effect, be to give the Plaintiff, during that term, by way of Rent, for his Shares, the annual sum of 7,000*l.* But there being, at this time, a very heavy Debt upon the Theatre, amounting to between 60,000*l.* or 70,000*l.* it was agreed that no part of this Rent should be paid to the Plaintiff until that Debt was discharged; and that the whole Profits of the Theatre, should, in the mean time, be applied in the reduction of the Debt. The Plaintiff appears to have had no other property at command than his interest in this Theatre; and, in order to provide an income for his subsistence, until the Debt was paid off, it was agreed that he should receive, from a Mr. *Rodwell* and a Mr. *Boscha*, certain annual Rents, paid by them to the Proprietors of the Theatre, for the use of the fruit rooms, and for the hire

of the Theatre for the performance of Oratorios: and that the Plaintiff should also receive an annual sum of 240*l.*, which was stated to be payable, by Sir *Edmund Antrobus*, as the Rent of a Private Box for alternate weeks. The Sums thus received by Mr. *Harris* were computed to amount, together, to 1,360*l.* a year, and were to be received by him in the nature of a loan; and, when the Debts should be discharged, the Plaintiff was to account for these Sums upon that principle.

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Mr. *Harris*, the elder, the Plaintiff's Father, who was Proprietor of one half of the Theatre, and who died in October 1820, had been, for many years, the Manager of the Theatre, at a Salary of 1,000*l.* a year: and he was succeeded, in his property in the Theatre, and in the Management, by the Plaintiff, who, having been educated for the Bar, had quitted his profession, and had for twelve years assisted his Father in the affairs of the Theatre. The Defendants, *Kemble*, *Willet* and *Forbes*, appear to have been dissatisfied with the Plaintiff's Management, and to have been desirous of saving the Salary of 1,000*l.* which was paid to him in that respect; and they seem to have entered into this Agreement with the Plaintiff, rather for the purpose of obtaining the Management of the Theatre to themselves, than with a view to any other profit from the bargain. They first proposed that the Rent should be determined, annually, by the actual profit of the Theatre. But the Plaintiff, protesting against that principle, required that the Rent should be computed at 15,000*l.*, and afterwards offered himself to become the Lessee at a Rent of 13,500*l.* a year. The Defendants say that they refused this offer, because they questioned the respon-

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sibility of the Plaintiff, and considered the offer as a mere artifice of treaty; and, afterwards, ultimately they agreed to become Lessees of the Theatre at a computed Rent of 12,000*l.* a year. The Defendants seem to have expected that Mr. *Const*, as the Proprietor of one-eighth of the Theatre, for his life, would have concurred in the intended Lease, and the name of Mr. *Const*, as a Party, was originally introduced into the Draft of the Agreement. This expectation was, however, disappointed; and the Agreement was executed by the Plaintiff, and the Defendants *Kemble*, *Willett* and *Forbes*, without Mr. *Const* being a party. Immediately after the execution of the Agreement, the Plaintiff retired from the Theatre, and the Management was assumed by the Defendants *Kemble*, *Willett* and *Forbes*. In this Management they continued when Mr. *Const* filed his Bill in the Court of Chancery, on the 15th of April 1823, against the Plaintiff and the Defendants *Kemble*, *Willett* and *Forbes*, thereby stating a certain Deed, bearing date the 9th of March 1812, by which the then Proprietors of the Theatre contracted with each other, that the funds of the Theatre should be applied in payment of certain specified Debts until the whole thereof were satisfied, and stating, further, that some of such Debts remained undischarged, and that the funds of the Theatre were now applied contrary to the Provisions of the Deed of 1812; and praying therefore that effect might be given to the Deed of 1812, and, for that purpose, that a Receiver of the Profits of the Theatre might be appointed. In this Suit, an Order was made by the *Lord-Chancellor* for the appointment of a Receiver, on the 19th of February 1824; and, four days afterwards, the Defendants *Kemble*, *Willett* and *Forbes*, caused a Letter to be written to the Plain-

tiff, with notice that they altogether repudiated the Agreement made with the Plaintiff in March 1822, whereby they were to become Lessees of the Theatre, stating, as a reason, the appointment of a Receiver in Mr. *Const's* Suit, under the Deed of 1812, and alleging that the Plaintiff was a party to that Deed, but that they, the Defendants *Kemble*, *Willett* and *Forbes*, had, at the time of the Agreement with the Plaintiff, no notice of its existence. The Parties to that Deed of 1812 were Mr. *Harris*, the Father, who was then possessed of one half, or twelve twenty-fourths of the Theatre; the Plaintiff *Harris*, then possessed of two twenty-fourths; the late Mr. *John Philip Kemble*, then possessed of four twenty-fourths; the late Mr. *White*, then possessed of three twenty-fourths; and the late Mrs. *Martindale*, then also possessed of three twenty-fourths. The Deed of 1812 appears to have been acted upon for a year or two only, and then to have been abandoned: and, at the time of the appointment of a Receiver, there remained unpaid, of the Debts intended to be provided for by that Deed, a Sum under 10,000*l.* It was in the month of August 1813 that the Defendants, *Willett* and *Forbes*, who had married two Daughters of Mr. *White*, became entitled to the three twenty-fourths, which, in 1812, had belonged to him: and, in the month of November 1820, the Defendant *Kemble* became entitled to the four twenty-fourths, which in 1812, had belonged to Mr. *John Philip Kemble*. Upon the death of Mrs. *Martindale*, the three twenty-fourths which had belonged to her in 1812, vested in Mr. *Const*, as her Executor, in the manner I have before stated. On the 24th of April 1824, the Plaintiff *Harris* filed the present Bill for the purpose of compelling the Defendants, *Kemble*, *Willett* and *Forbes*, to adhere to the Agreement of the 11th of March 1822;

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and Mr: *Const* is made a Party Defendant to this Bill, the Plaintiff insisting that, although not a Party to the Agreement between the Plaintiff and Defendants, he had, by his subsequent conduct, entitled the Plaintiff to call upon him, in a Court of Equity, to confirm it. With respect to Mr. *Const* it may be well to state, at once, that the Plaintiff has not established any case against him; and that the Bill, as to him, must be dismissed with Costs. The Defendants, *Kemble*, *Willett* and *Forbes*; by way of Defence to this Bill, first insist that, having entered into the Agreement of March 1822 with the Plaintiff, solely for the purpose of acquiring the Management of the Theatre, and having lost that Management by the appointment of a Receiver in Mr. *Const's* Suit, they are no longer bound by their Agreement with the Plaintiff. It is to be observed that, in the Agreement of March 1822, the Plaintiff expressly contracts that he is not to be bound to the performance of the Agreement further than as it is to be performed by, or is applicable to him; and the Defendants, *Kemble*, *Willett* and *Forbes*, expressly Contract that they will be bound by the Agreement, not only so far as it is to be performed by, or is applicable to them, but so far also as is applicable to, or to be performed by Mr. *Const*, or is applicable to the Estate of Mrs. *Martindale*, which he represents: and it appears to me, therefore, to be against the clear effect of this express Contract that they now seek to make the Plaintiff responsible for the act of Mr. *Const*.

These Defendants next insist that they had no notice of the Deed of 1812, under which the Receiver is appointed; and that, as the Plaintiff was a Party to that Deed, and is to be taken to have known that it might

be used as an Instrument to defeat that Possession and Management of the Theatre, which, on the part of the Defendants, was the motive of the Agreement, it was the Plaintiff's duty to have apprised the Defendants of that Deed; and that he, not having done so, they are entitled to be released from their Agreement with the Plaintiff. It is not pretended that there was any intentional concealment of this Deed on the part of the Plaintiff. It had long been abandoned and lost sight of by all Parties concerned; and the very Persons under whom these Defendants claim having executed that Deed, it is not easy to understand upon what principle it can be material whether these Defendants had, or had not actual notice of the Deed. But, if that were material, I should be bound to declare, upon the evidence in the Cause, that these Defendants are to be affected, in this Court, with notice of that Deed.

These Defendants next insist that, although the Plaintiff did oppose the appointment of the Receiver, yet, after the Receiver's appointment, he supported the proceeding of Mr. *Const* to have the Monies, paid to the Receiver, secured in this Court; and that the payment of the Money into Court, being contrary to the Terms of the Agreement of March 1822, which placed the Monies in the hands of these Defendants, they, for that reason, are entitled to be relieved from the Agreement. That the Plaintiff did support the proceeding of Mr. *Const* to have the Monies paid to the Receiver secured in this Court, is not disputed. The present Bill of the Plaintiff to enforce the Agreement of March 1822 was then depending; and the support given by the Plaintiff to Mr. *Const*'s proceeding, cannot be represented as evidence of an intention to abandon the

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Agreement. It is said, for the Plaintiff, that he at the same time strenuously insisted on the Agreement, but that these Defendants having given him the notice that they repudiated the Agreement, he had a right to use his efforts to secure the receipts of the Theatre, in this Court, as a measure that would be beneficial to him in the alternative of the Defendants succeeding to avoid the Agreement. Whether the Plaintiff's view of the subject, or his conduct, in this respect was or was not correct, it is not necessary for me to state. It is enough to say that his conduct in that respect, can form no ground upon which these Defendants can retire from the Agreement in question.

These Defendants next state that, for want of more correct information, they were obliged to make their calculations, as to the Rent that ought to be paid for the Theatre, from statements and accounts furnished by the Plaintiff, and purporting to be founded upon his personal experience and his knowledge of the affairs of the Theatre ; and that the statements and accounts so furnished by him were incorrect and erroneous ; and that they were misled by them, and are therefore entitled to be relieved from the Agreement ; and they refer to particular statements and accounts in support of this allegation. Before I enter into the consideration of these particulars, it is necessary to premise some general facts. During the Management of Mr. *Harris*, the Father, and of the Plaintiff, all Accounts of the Theatre were kept by Mr. *John Brandon*, the Treasurer ; and it is admitted by the Defendants that the Accounts so kept were, at all times, open to their inspection, and were repeatedly inspected by them, and, with these Accounts they were so well acquainted, that one of the Defendants sug-

gested an alteration in the mode of keeping them which was actually adopted. These Defendants allege, in certain passages in their Answers which have been read as evidence, that *Brandon* was an incompetent person to manage the Accounts, and that he did not, in fact, understand the same, and that he improperly left the same in a great degree to his Son, *James Brandon*: and further, that, in consequence of the imperfect and irregular manner in which the Accounts had been kept during the Management of the Plaintiff, and his Father, there were not any means, in the year 1821, whereby the Defendants could ascertain the exact amount of the Debts of the Theatre, or of their own liabilities consequent thereon: and, further, that they were informed, by Mr. *Harrison*, who was the medium of communication between the Plaintiff and the Defendants in the treaty which led to the Agreement in question, that he, Mr. *Harrison*, had repeatedly declared to the Plaintiff, pending the treaty, that the Plaintiff did not understand and was incompetent to manage the Accounts of the Theatre; and that he did not know the true state of the Accounts of the Theatre; and that he did not understand the nature of accounts, or of profit and loss. Mr. *Henry Robertson*, who was appointed, by the Defendants when they took upon themselves the Management of the Theatre, to be Treasurer in the place of Mr. *Brandon*, and who is now the Receiver under the *Lord Chancellor*, and who is represented as a skilful accountant, being examined as a Witness on the part of the Defendants, deposes that, from the obscure manner in which the Accounts were kept by Mr. *Brandon*, he does not conceive that the true state of the affairs of the Theatre, and the actual profit and loss that had been made prior to the date of the Agreement between the

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Plaintiff and Defendants, could have been collected, from the Books and Accounts, by any person not intimately acquainted with the Management of the Theatre, or without the most minute and laborious examination thereof by a person well accustomed to the examination of accounts. In the Agreement of March 1822 between the Plaintiff and Defendants, there is a provision that a list of the names of the Creditors of the Concern then to be made out and signed by the Parties, is not to be deemed conclusive as to any items or accounts contained therein, or omitted to be included therein, or as to any debt or demand omitted therefrom; but that all just and correct Debts, whether stated or omitted in that list, were to be fully satisfied. And this provision amounts to an admission to the same effect as Mr. Robertson's testimony.

Having made these preliminary observations, I shall now proceed to the particular Statements and Accounts of the Plaintiff, of which the Defendants complain.

The treaty for a Lease of the Theatre from the Plaintiff to the Defendants, commenced, according to Mr. Harrison's evidence, in the month of December 1821; and, at the beginning of the treaty, a Letter bearing date the 21st of that December is written, by the Plaintiff to Mr. Surman, for the purpose of being communicated by him to Mr. Harrison on the part of the Defendants. That Letter is proved as exhibit (L.), and the material part of it is in the words following: "The total amount of the Receipts during the eleven seasons is 991,811 l.; average per season, 82,650 l. Now I have no doubt one third of the above Sum may be accounted as Profit; and I am sure if the Sums were calculated

which have been paid (independently of the expenses of working the Theatre), that I should be fully borne out in my assertion. In a Letter which I am preparing, and which I mean to address to Mr. *Harrison* on the delivery of our List of Debts, &c., I shall touch more fully on this subject, and shall show under how much more advantageous circumstances any Tenant of Covent Garden Theatre would now stand, than my Father and myself have stood during the term of extreme pressure from enormous Debt, &c. &c." This Letter was forwarded by Mr. *Surman* to Mr. *Harrison*; and it is said, by the Defendants, that, founding their calculation on the statement here made by the Plaintiff, they were greatly deceived; for, although it appears, by Mr. *Brandon's* Accounts, that the Receipts for the eleven seasons did amount to 991,811 *l.* being the Sum stated by the Plaintiff, yet this Sum, to the amount of 66,289 *l.* was partly made up by Monies received on benefit nights, which were afterwards paid over to the actors to whom the benefits belonged, and partly by Money advanced by the Bankers, and ought not, therefore, to have been included in any computation of Profits; and they prove these facts by the evidence of Mr. *Robertson*: and they then proceed, with certain comparative statements of figures, to show the effect that would be produced, in calculation, if the Plaintiff's statement as to the 991,811 *l.* had been correct, and if the Profits could have been rightly estimated at one third of the gross receipt. It does not appear to me necessary to follow these calculations. The Plaintiff, in this statement of 991,811 *l.*, must be understood to refer to Mr. *Brandon's* Accounts, which were equally open to the Plaintiff and the Defendants, and not as speaking from personal knowledge: and Mr. *Brandon's* Accounts, upon the

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face of them, justify that statement: and, as the Defendants at that time complained of the imperfect and irregular manner in which Mr. *Brandon* kept these Accounts, and had been informed, by Mr. *Harrison*, that the Plaintiff did not know the true state of the Accounts of the Theatre, and did not understand the nature of accounts, or of profit and loss, the Defendants cannot reasonably state, in a Court of Justice, that they either did rely, or were warranted to rely upon this representation made by the Plaintiff, or were misled by it. The Plaintiff's estimate of the Profits at one third of the gross receipts, professes to be nothing more than a mere conjecture on his part.

The Defendants further allege that they were induced to believe, by the representations of the Plaintiff, that a saving of 200*l.* a week, or 2,000*l.* a year might be made in the expenses of the Theatre, and, that in this respect, they were also misled. Upon this head the Defendants refer to a Letter, from the Plaintiff to the Defendant *Willett*, which is dated, on the 27th July 1820, and is proved as exhibit (A.) and also to two exhibits (G.) and (H.) which were inclosed in a Letter, written by Mr. *Surman*, on the part of the Plaintiff, to Mr. *Harrison*, which is dated on the 3d of October 1821; and it is proved as the exhibit (F.). It is to be observed that the exhibit (A.) was written in the lifetime of Mr. *Harris*, the elder, when there could not possibly exist the least idea of the Defendants ever becoming the Lessees of the Theatre; and it must be under very special circumstances indeed, which have no existence here, that a Letter written at that time could be brought to bear upon the subsequent treaty, as a representation affecting that treaty. But if it were ad-

mitted that it was a representation upon which the Defendants were entitled to rely, it is only a statement that by means of the Plaintiff's connexion with the Dublin Theatre he had been able to reduce the expenses of the ensuing season above 200*l.* a week, and not a representation that a permanent annual saving of 200*l.* a week might be made in the expenses of the Theatre. With respect to the exhibits (G.) and (H.), they were written also prior to the treaty for the Lease. They do, indeed, represent that a reduction of expenditure, to the amount 7,105*l.* 5*s.* 7*d.* had occurred in the season of 1820-1821, this being the season to which the Plaintiff refers in the exhibit (A.), and thus establishing the truth of the statement in that Letter that, by his connexion with the Dublin Theatre, he had been able to reduce the expenses of the ensuing season above 200*l.* a week: but so far from representing that such a deduction is always to be expected, the Letter (F.) which incloses these exhibits, has this passage, speaking of the season 1821-1822:—"The present saving per week is 27*l.* and a fraction, and, the usual number of weeks being forty-four, I need not point out to you the saving of each season in future."

It may be observed that the exhibits (G) and (H) were furnished by Mr. *Brandon*, and were mere abstracts of the Accounts kept by him, and which were accessible to all parties, and neither contained nor professed to contain any personal representations from the Plaintiff. In exhibit (E), which is a letter written by the Plaintiff to Mr. *Surman*, dated the 24th of May 1824, and which was communicated to Mr. *Harrison*, on the part of the Defendants, the Plaintiff states: "It must be by gradual reduction of the large Salaries that our

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great saving must be made; I have been through the list of servants, &c. and I think some reduction may be made, but of trifling amount in comparison with performers salaries." It is plain that it was by a saving in the performer's salaries, that the Plaintiff's connexion with the Dublin Theatre enabled him to reduce the expenses 200*l.* a Week, in the year 1820-1821. In the exhibit (A) before referred to, he assigns, as a reason for that reduction, that, by keeping a Theatrical force at Dublin ready, at any time, to be transplanted, he could, of course, do with less stationery Company at Covent Garden. Upon the whole, therefore, the Defendants seem to me to have failed altogether, in the proof of their allegation that they were misled by the Plaintiff's representations with respect to permanent saving in the expenses of the Theatre. Mr. *Harrison*, in his evidence, states that the Plaintiff repeatedly assured him that the Theatre had made profits to the extent of 10,000*l.*, in each of the years, 1819, 1820 and 1820-1821, and, that in consequence thereof, 20,000*l.* or thereabouts, of the old Debt of the Theatre had been paid off, and very little new Debt contracted. If Mr. *Harrison*'s memory in this respect is to be considered as correct, it is not and cannot be denied that the Plaintiff is guilty of great misrepresentation; for, in the season of 1819-1820, there was no profit, but great loss; and, although it be true that about 20,000*l.* of the Debt was paid off, in the two seasons, and comparatively little new Debt contracted, yet it was so paid off, not by Profits only, but by sale of Boxes, which produced 10,000*l.*, and paid off a Debt of 12,000*l.* Upon this point it is first to be observed that the Defendants, who in their Answers enumerate the other alleged misrepresentations of which they complain, do

not, in their Answers, take any notice of a misrepresentation in this respect; and this, being more clear and tangible than any other alleged misrepresentation which they have enumerated, it is not probable, if it had taken place, that either Mr. *Harrison* would have omitted to mention it to them, or that they would have omitted to state it in their Answers.

It is next to be observed that it would be very strange that a misrepresentation should be made which is directly contrary to the facts as they appeared upon the face of Mr. *Brandon's* Accounts, which were equally open to all Parties, and must be considered as equally known to all. It is further to be observed that the exhibits (G.) and (H.) before referred to, which contain Mr. *Brandon's* statement of the Accounts of these seasons, and which were sent, by the Plaintiff, to Mr. *Harrison* himself, only two months before, do, in effect, represent the season 1819-1820 as a losing season to a great amount, instead of a profitable season to the extent of 10,000*l.* The total amount of the receipts of that season are there stated at 55,833*l.* 14*s.*, and the expenditure, at 41,078*l.* 4*s.*, not including either tradesmen's bills or regular annual payments, which may be estimated, together, at least at 20,000*l.*, making together an excess of expenditure, beyond the receipts, of more than 6,000*l.* It may be observed also that in the Letter (F.) which incloses the exhibits (G.) and (H.), Mr. *Harrison* is informed that the Plaintiff is using every means he can to get the Leases of the Boxes settled, that the Debts of Mr. *Copeland &c.*, due before August 1818, may be, as soon as possible, discharged; thus distinctly informing Mr. *Harrison* that the Debts to be paid off were to be discharged, not out of the Pro-

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fits merely, as he supposes the Plaintiff to have represented, but by the application of the price of Boxes also.

From all these circumstances I am judicially bound to come to the conclusion that Mr. *Harrison* has misapprehended the statement made to him by the Plaintiff.

On the part of the Defendants, some other minor points of alleged misrepresentations were urged, which appear to have arisen from the different sense applied to the term, "Profits of the Concern," by the Plaintiff and the Defendants, and to which I do not think it necessary to refer more particularly. The Plaintiff very properly, as it appears to me, treated the extinction of Debt as Profit.

The Defendants next charge the Plaintiff with a concealment of a transaction of his Father, in which he joined, in respect to the moiety of a Box sold by his Father to the late Sir *Ed. Antrobus*. It appears that this Box was let, for alternate weeks, to His R. H. the Duke of *Gloucester*, at an annual Rent of 210*l.* In the month of September 1817 the Plaintiff and his Father assigned the other moiety of this Box, to the late Sir *Ed. Antrobus*, for a sum of 2,625*l.*, the whole of which was received by the Father. This sale was not communicated to the other Proprietors of the Theatre; but it was represented to them that the moiety of the Box was let to Sir *E. Antrobus*, for a term of twenty-one years, at the same annual Rent of 210*l.* which was paid by the Duke of *Gloucester*; and, during the life of Mr. *Harris*, the Father, he accounted with the other Proprietors for this Rent of 210*l.* as if paid by

Sir E. Antrobus. Since the death of his Father the Plaintiff has in like manner accounted with the other Proprietors for the Rent of 210*l.* as if paid by Sir E. Antrobus: and, on the occasion of the Agreement between the Plaintiff and the Defendants for the Lease in question, the Plaintiff continued to represent the Box as let to Sir E. Antrobus at this Rent of 210*l.*: and it was a part of his Agreement with the Defendants that this Rent, together with certain other Rents payable to the Proprietors of the Theatre, amounting together to 1,360*l.* a year, should be received by the Plaintiff in the manner hereinbefore stated. Since the Agreement, the Defendants have learnt the truth of the case from Sir E. Antrobus; and they now insist upon this transaction, as a reason for their being relieved from the Lease. The concealment of the real nature of this transaction was extremely incorrect; although it was the same thing to the other Proprietors as if the Box had been actually let to Sir E. Antrobus at the 210*l.* a year. Upon referring to the Table of Annuities, it appears that an Annuity of 210*l.* for twenty-one years, computing interest at five per cent. is worth, in present Money, 2,692*l.* 7*s.* Sir E. Antrobus paid only 2,625*l.* 2*s.* so that Mr. Harris, the Father, in effect, took upon himself to account, with the other Proprietors, for an Annuity of 210*l.* for twenty-one years, without having received quite the full value for this undertaking; and his half of the property of the Theatre was as good a security to the other Proprietors, as if Sir E. Antrobus had undertaken to pay the 210*l.* a year. It was, however, the duty of the Father and the Plaintiff to have disclosed the truth to the other Proprietors, and to have given them an option of receiving, either their proportions of the 2,625*l.*, or

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their proportions of the 210l. a year ; and, if the Plaintiff had been well advised, he would have taken the occasion of his treaty with the Defendants to state the actual facts. But still the concealment cannot be made to bear upon the validity of the Agreement for the Lease. The Plaintiff represented the Box as let for 210l. a year ; and, as far as it regards the Defendants, it is to be considered as let at that sum, the Plaintiff being bound to account with his Co-proprietors for that Rent : and, his interest in the Theatre being a full security for the payment of it, and unless the Defendants can show that their interests as Lessees are prejudiced by that concealment, it must be indifferent to the Defendants whether the 210l. a year is accounted for by the Plaintiff, or by Sir E. *Antrobus*. If the Defendants prefer their proportion of the Price to their proportion of the Rent, there is nothing in the Agreement to prejudice that question.

The Defendants next charge that, on the 28th of September 1820, Mr. *Harris*, the elder, assigned a rent of 450l. which was and is payable for Lady *Holland's* Box, to Messrs. *Stevenson & Co.* the Bankers, by way of security for a sum of $6,000\text{l.}$ which was due from the Proprietors of the Theatre, and for a further sum of $4,940\text{l.}$ which was due from himself, individually ; and that this transaction was also concealed from them, and forms another reason why they are entitled to be relieved from the Agreement in question. Upon reference to the books of Account of the Theatre, there appear to be entries which manifest that this Rent of 450l. was paid to Messrs. *Stevenson & Co.* ; and if the Defendants did not actually know the reason why it was paid, they had thus sufficient notice of the

transaction to put persons of ordinary prudence upon an inquiry, which would have given them full information; and it is their own fault if they failed to make that inquiry. With respect to the security to Messrs. *Stevenson & Co.* extending not only to the Debt due from the Theatre, but to a private Debt of Mr. *Harris*, it is to be observed that, as far as regards Mr. *Harris's* private Debt, it can affect only his Share of the Theatre, and is the same thing as if he had given a security for his private Debt by a distinct Deed.

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The Defendants, in their Answers, made another charge with respect to the alleged concealment of two silver tickets for admission, granted by Mr. *Harris*, the Father, to the late Mr. *Coutts*. It appears, upon this evidence, that, during the whole time the Defendants were interested in the Theatre, persons were constantly admitted with these tickets, and that they were regularly entered in the nightly Accounts: and this charge was abandoned at the Bar.

The result of my opinion upon all the facts of the Case, is, that the Plaintiff is entitled to a decree for a specific performance of this Agreement, as between the Plaintiff and the Defendants *Kemble, Willett and Forbes*; and I must refer it to the *Master* to settle a proper Deed, accordingly, having regard to the circumstance that Mr. *Const*, not being bound by the Agreement, his interest cannot be affected by it: and the *Master* must appoint a new Trustee in the place of Mr. *Harrison*. The Defendant *Trotter*, who is only made a Party in his character of Executor of Mr. *White*, was not a necessary Party to this Suit: and the Bill must be dismissed, as against him, as well as Mr. *Const*, with Costs. The

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adjoining to the Capital Messuage, and Timber Trees growing upon the Estate, which had been planted or were growing there for the protection or shelter or ornament of the Mansion House, or of the Gardens, Pleasure Grounds or Buildings thereunto adjoining.

Mr. Shadwell and Mr. Jemmett, for the Plaintiffs:—

As there are no Woods that exactly answer the description in the Will, the only way to construe the exception is, to say that it relates to Timber in the Park, the Demesne Lands, and in all the Woods which have Avenues in them, or which contribute to the ornament or protection of the Park.

Mr. Sugden and Mr. Finch, for the Defendant:—

The only construction that can be put upon the expression “ Woods adjoining to the Capital Messuage” is, Woods growing in the Demesne Lands. The protection of the Avenues cannot be extended to Woods in which the Avenues are; for, where the Testator means to protect the Woods, he mentions them by their proper name, and where he means Avenues, he calls them so.

The Vice-Chancellor:—

This restriction is plainly intended for the protection of the residence in the Testator's Capital Mansion at *Arbury*, and it extends, in terms, not only to Timber in the Park, Avenues and Demesne Lands, but to Timber growing in Woods adjoining to the Mansion House; by which is meant, therefore, some Timber which grows neither in the Park, Avenues or Demesne Lands. The term “ adjoining” is indeed vague; but it must receive a construction from the apparent purpose of

the Testator, and is to be understood of Woods so adjoining to the Mansion House as to contribute to its comfort or pleasure ; and in that sense it will afford the same protection to the Mansion House as the rules of a Court of Equity would have extended to it if the restriction had been omitted ; and certainly the Testator did not mean by this exception to enlarge the rights of the Tenant for life. Declare, therefore, that this exception extends to all Woods so adjoining to the Capital Messuage of *Arbury*, as to serve for ornament or shelter to it.

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RICHARDSON v. MILLER.

4th December.

THIS was a Suit, by Infants, against their Father's Executor, for the usual Accounts. The next Friend of the Plaintiffs was a Solicitor wholly unconnected with the family. Mr. *Hart* and Mr. *Barber*, for the Defendant, moved that the next Friend might be restrained from further proceeding in the Suit.

Mr. *Wakefield*, *contra*, said that any one might, by the practice of the Court, institute a Suit on behalf of Infants.

The Vice-Chancellor referred it to the *Master* to inquire whether it would be for the benefit of the infant Plaintiffs that this Suit should be prosecuted : the Defendant, the Executor, undertaking, by his Counsel, to

to the *Master* the Accounts prayed for by the Bill.

2 Mylack. 247.

Playton v. Clarke 3 d. & S. 7 x 1684

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render to the *Master*, upon his affidavit, an account of the Testator's Assets, and of the balance in respect thereof in the Defendant's hands; and the *Master* to be at liberty to state any circumstances specially to the Court.

19th December.

HAGGETT v. WELSH.

Contempt.
Arbitration.

Although a reference to Arbitration is made under an Order of the Court, either Party may revoke the authority of the Arbitrator before the Award is made; but it is a high Contempt so to do.

6 Bing 443
10 B&C 483

IN this Cause an Order had been made, by consent, referring the Cause to Arbitration; but there was no agreement in the Order that the Submission should be made a rule of any Court, nor that the Award should be made a rule of the Court of Chancery. Pending the reference, one of the Defendants gave notice to the Arbitrator that he revoked his authority; but the Arbitrator proceeded, and made his Award. The other Defendant, in whose favour the Award was made, now moved that the Award might be made a rule of this Court, and that the Court would direct the payment of the Sum awarded to him.

The Plaintiff made a Cross-motion that he might be at liberty to proceed with his Cause, considering the Award as a nullity, by reason of the revocation of the authority of the Arbitrator by one of the parties.

Mr. Beames supported the original Motion.

Mr. Pepys supported the Cross-motion, and cited *Vynior's Case* (a), *Barker v. Lees* (b), *Hide v. Petit* (c),

(a) 8 Co. 81. (b) 2 Keb. 64.
(c) 1 Ch. Ca. 185; 2 Freem. 133; 1 Eq. Ab. 49.

Marsh v. Bulteel(d), Milne v. Gratrix(e), King v. Joseph(f), Harcourt v. Ramsbottom(g), and Clapham v. Higham(h).

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Mr. Sugden and Mr. Campbell opposed the original Motion, and cited *Doe v. Brown(i)*.

The VICE-CHANCELLOR :—

Where an Order of reference is made by any Court, it is not necessary, to give the Court authority with respect to the Award, either that the Submission should be made a rule of Court, or that the Award should be made a rule of Court. It is a necessary part of the agreement that the Submission should be made a rule of Court, where the reference is under the Statute, or where the reference is made at *Nisi Prius*, or by a Judge's Order. But, where the reference is made under the Order of any Court, there, *ipso facto*, disobedience to the Award incurs a contempt of that Court, and the Court will lend its aid to enforce the Award. The first part of the Defendant's Motion is therefore superfluous ; and I cannot act upon the second part, being of opinion that, notwithstanding the reference is made under an Order of Court, the authority of the Arbitrator may, at any time before the Award is made, be revoked by either of the Parties, and that the Arbitrator had, consequently, in this case, no power to make any Award. It is to be observed, however, that this reference, taking place under an Order of the Court, the revocation of the authority of the Arbitrator is a high contempt of the Court ; and, when a proper application

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11. Recd 449

(d) 5 B. & A. 507. (e) 7 East, 608. (f) 5 Taunt. 502.
(g) 1 J. & W. 505. (h) 1 Bing. 87. (i) 5 B. & C. 384.

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is made, will be dealt with accordingly. The Motion of the Plaintiff is misconceived. This Cause is gone out of the Paper; and, in order to be heard, must be again set down, and his proper application will be, that he may be at liberty again to set down his Cause, which, under the circumstances, the Registrar, I apprehend, will not permit without the special Order of the Court.

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17th January.

Partition.
Exceptions.
Practice.

Exceptions will not lie to the Return of Commissioners in a Suit for Partition, on the ground of inequality of value in the Lots. In all cases of improper conduct in the Commissioners, a Motion must be made to suppress the Return.

IN this Case Exceptions were taken to a Return made by the Commissioners under a Decree for Partition, on the ground of unequal value in the three Allotments made by them. The three Tenants in common had taken by Lot; but it was alleged, by the Exceptant, that management had been used, by the Commissioners, in the drawing of the Lots, so as to throw upon him the Lot which was of inferior value; and a Motion to suppress the Return on that account, now came on to be heard with the Exceptions.

Mr. Sugden and Mr. Daniel, in support of the Exceptions, cited *Watson v. Duke of Northumberland* (a).

Mr. Heald, Mr. Horne, Mr. Rose, and Mr. Smith, appeared in support of the Return.

The Vice-Chancellor, referring to the Case of *Corbet v. Davenant* (b), ruled that Exceptions would not lie to

(a) 11 Ves. 153.

(b) 2 Bro. C. C. 252.

such a Return; and that the Motion to suppress the Return was the proper course. Upon the Motion, the *Vice-Chancellor* observed that the charge of management on the part of the Commissioners wholly failed, and that, with respect to comparative value, all that could be stated was, that there were conflicting opinions by different Surveyors; and, considering that the three Commissioners here were named by the three different Parties, and were, therefore, judges of their own choice, the principles which applied to Arbitrators were properly applicable to them; and, for that reason, he should have hesitated to suppress the Return, even if he had been satisfied that the Commissioners had erred in their judgment as to value.

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1. m. & A. 330
1. 9. 5. 8. 535
2. 5. 658

Motion refused, with Costs.

COURTNEY v. FERRERS.

22d February.

BY an Indenture, dated the 23d of April 1787, after reciting that the Rev. *E. Ferrers* had effected an Assurance on his Life, for 3,000*l.*, in The Equitable Assurance Office, that gentleman assigned, to Sir *Nash Grose* and *George Rose*, esq. the Policy of Assur-

Will.
Construction.
Policy of Assu-
rance.
Bonus.

A Policy of
Insurance for
3,000*l.* on *A.*'s

Life was assigned to Trustees, and, by a Deed of even date, Trusts were declared of it by the description of "the sum of 3,000*l.* for which *A.*'s Life was insured," and power was given to *B.* to dispose of it by Will. *B.*, after reciting the Settlement, bequeathed 1,000*l.*, part of the sum of 3,000*l.*, to *A.*, and the remaining sum of 2,000*l.* to *C.* At *A.*'s death, 9,000*l.* was received under the Policy: Held that the whole fruits of the Policy were subject to the Trusts of the Settlement, and passed by the Bequests to *A.* and *C.* in proportion to their Legacies.

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ance, and all sums of Money, Benefits and Advantages to arise, accrue or become due or payable upon or by virtue of it, in any manner howsoever.

By the Settlement on the Marriage of Mr. *Ferrers* with Miss *C. M. Young*, bearing even date with the Assignment, after reciting a Lease, granted in 1786, by the Bishop of *Ferns*, to Miss *Young*, of certain Hereditaments in the County of *Wexford*, for twenty-one years; that Miss *Young* had transferred 2,100*l.*, part of a sum of 3,800*l.*, Three per Cent Consols, to Sir *N. Grose* and *G. Rose*; that under the Trusts of certain Indentures, 2,000*l.* was to be raised and paid to such persons as Mr. *Ferrers* should, by his Will, appoint, and, in default of appointment, to his Executors or Administrators; that, upon the treaty for the Marriage, it had been agreed that the 2,100*l.* Consols should remain vested in, and the Lease be assigned to Sir *N. Grose* and *G. Rose*, upon the Trusts after mentioned; that Mr. *Ferrers* had lately made an Insurance on his Life, in The Equitable Assurance Office, for 3,000*l.*, which he had assigned to the same persons, and was to be paid to them upon the Trusts after mentioned, and which sum of 3,000*l.*, together with the 2,000*l.*, should be received and disposed of by them in the manner after expressed; Miss *Young* assigned the Leasehold Premises to Sir *N. Grose* and *G. Rose*, for the remainder of the term of twenty-one years: And it was declared that the 2,100*l.* Consols and the Leasehold Premises were transferred and assigned to them upon trust, during the joint lives of Mr. *Ferrers* and Miss *Young*, out of the Rents and Dividends, to pay to Miss *Young* the yearly sum of 100*l.* for her separate use, and, in case of Mr. *Ferrers* omitting to do it,

according to his Covenant therein contained (a), to keep insured, at the Equitable or some other Insurance Office, the sum of 3,000*l.* upon Mr. *Ferrers's* Life, and to renew the Leases of the Leasehold Premises when they thought proper, and to pay the rest of the Rents and Dividends to Mr. *Ferrers* for his life, and, after his decease, to Miss *Young* for her life, and, after the decease of the Survivor, in trust for the Children of the Marriage, as Mr. *Ferrers* and Miss *Young*, or the survivor of them, should appoint: And it was declared that, after the decease of Mr. *Ferrers*, the Trustees should stand possessed of the 3,000*l.* upon the Trusts before expressed concerning the Leasehold Premises and the 2,100*l.* Consols; and Mr. *Ferrers* covenanted with the Trustees to appoint, by his Will, the 2,000*l.* to be paid to the Trustees upon the same Trusts.

Mrs. *Ferrers* afterwards died, leaving one Daughter only. The Daughter attained twenty-one on the 24th October 1809; and in the November following, Mr. *Ferrers* released to her his Life Interest in the 2,100*l.* Consols.

By the Settlement on the Marriage of the Plaintiff with Miss *Ferrers*, dated the 23d of January 1810, after fully reciting the former Settlement, and that it had been agreed that Mr. *Ferrers* should, in exercise of the power given to him by the Settlement of the 23d of April 1787, appoint the Leasehold Premises, and the 2,000*l.* and 3,000*l.* to his Daughter, to become immediately interests vested in her; but, as to the Leasehold

(a) On referring to the Settlement, it appeared that no such Covenant was contained in it.

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Premises, to be subject to his Life Interest in the same: and that the Leasehold Premises and the 2,000*l.* and 3,000*l.* should be settled upon the Trusts thereinafter expressed; and that the sum of 1,000*l.* should be raised and paid to the Plaintiff for his own use out of the 2,100*l.* Consols, and that the remainder should be retained by Miss *Ferrers* for her separate use: Mr. *Ferrers* appointed the Leasehold Premises (subject to his Life Interest therein), and the 2,000*l.* and 3,000*l.* to his Daughter, her Executors, Administrators and Assigns; and Miss *Ferrers* assigned to the Trustees of her Settlement the 2,000*l.*, and all that the sum of 3,000*l.* assured by the before-mentioned Instrument or Policy of Assurance, to be paid to the said Sir *Nash Grose* and *George Rose*, their Executors, Administrators and Assigns, upon the decease of the said *Edmund Ferrers*, as thereinbefore was mentioned; and also all that the Covenant and Agreement entered into, by the said *Edmund Ferrers*, in the said Indenture of the 23d day of April 1787, for paying the premiums and other expenses attending the said Insurance, and the full benefit and advantage of the said Covenant and Agreement, and all the Right, Title, Interest, Property, Possibility, Claim and Demand whatsoever, of her the said *Caroline Mary Ferrers*, in, to and upon the same Premises; To hold the said sums of 2,000*l.* and 3,000*l.*, and all the said Covenants and Agreements, and all and singular other the Premises lastly thereby assigned, unto the Trustees upon the Trusts thereinafter declared: and she appointed the same Trustees to be her Attornies, to demand and receive the said sums of 2,000*l.* and 3,000*l.*; and it was thereby declared that the Trustees should stand possessed of the 2,000*l.* and 3,000*l.* upon trust, to lay out and invest the same upon Government or real Securities, and pay

the Interest and Dividends of those Securities, and the Rents of the Leasehold Premises, after Mr. *Ferrers*'s decease, to the Plaintiff for his life, and, after his decease, to Miss *Ferrers* for her life, and, after the decease of the Survivor, to the Children of the Marriage, as therein mentioned; and if there should be no such Child, and Miss *Ferrers* should die in the life-time of the Plaintiff, then in trust to assign the Trust Premises to such persons as Miss *Ferrers* should, by Will, appoint, and in default of such appointment, in trust for her next of Kin at her decease, under the Statute of Distribution, as if she had died unmarried; and the Trustees were thereby empowered to sell the Leasehold Premises, and to lay out the Money arising from such sale upon Government or real Securities, and to stand possessed of those Securities upon the same Trusts as were thereinbefore expressed concerning the 2,000*l.* and 3,000*l.*

Mrs. *Courtney*, by her Will, dated the 23d of July 1810, and which was expressed to be made in exercise of the power given to her by her Settlement, gave the Leaseholds, (subject to her Father's Life Interest therein), and the 2,000*l.*, to the Plaintiff, and then proceeded as follows:

"I give and bequeath to my said Father, to be disposed of by Deed or Will as he shall think fit, the sum of 1,000*l.*, part of the sum of 3,000*l.*, which by the said Indenture of Settlement, made on my said Marriage, my said Father covenants to keep insured on his life, and which is subject to the Trusts of the said Settlement. The remaining sum of 2,000*l.* I give and bequeath equally between my two Uncles *Thomas Ferrers*, esq. and the Rev. *John Ferrers*; and, in case of the death of both or either of my said Uncles in my life-time, leaving

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any Child or Children them or him surviving, then I give and bequeath the shares or share of them or him so dying unto and equally between their or his respective Child or Children. And as to all the rest and residue of my Property over which I have any power of disposition, I give and bequeath the same unto my said Husband; and I appoint him sole Executor of this my last Will."

Mrs. *Courtney* died in 1811, without issue. Mr. *Ferrers* died in 1825. His Brothers *Thomas* and *John* were his personal Representatives.

Owing to the additions which, according to the practice of The Equitable Assurance Office, had been made, from time to time, to the Sum insured, upwards of 9,000*l.* was received under the Policy upon Mr. *Ferrers*'s decease.

The question in the Cause was, Whether the whole of the Sum received under the Policy, or only the 3,000*l.*, was subject to the Trusts of the Settlement, and passed by the Bequests to the Testatrix's Father and Uncles?

Mr. *Horne* and Mr. *Bickersteth*, for the Plaintiff:—

There can be no doubt that, by the Assignment, the Policy, and all Sums to be recovered under it, were vested in the Trustees. It is impossible to use stronger words for that purpose than those contained in that instrument. The whole fruits of the Policy must, therefore, be held to be included in the first Settlement. If Mr. *Ferrers* ever thought he was entitled to any additions that had been or might be made to the Sum insured, he ought to have asserted his right before he executed the second Settlement; but he never made any such claim: and, as the whole Fund passed by the description of

3,000*l.* in the former Settlement, it must be held to pass by that description in the latter. Mrs. *Courtney*, therefore, had power to dispose by Will of the whole Sum which might be payable under the Policy. But it cannot be contended that her Uncles, under the Bequest to them of the remaining sum of 2,000*l.*, are entitled to the residue of the Fund; for, in that case, there would be nothing upon which the residuary Bequest could operate, as she had no Residue, except the surplus of the Monies payable upon the Policy.

Mr. Sugden and Mr. Loraine, for the Defendants Thomas and John Ferrers:—

The Trustees were not bound, by the Settlement, to insure Mr. *Ferrers*'s Life in The Equitable Insurance Office, but were at liberty to insure it in any other Office. This is material, for in some of the Offices no Bonuses are given. Throughout the whole of each of the Settlements nothing is mentioned but the sum of 3,000*l.* None of the parties seems to have supposed that any addition would ever be made to the Sum insured. In the interval between the two Settlements considerable additions had been made to it; but it is not the Sum to be recovered under the Policy, but the 3,000*l.*, which is the subject of the second as well as of the first Settlement. The circumstance of the 2,000*l.*, which could neither be increased nor diminished, being coupled with and put on the same footing as the 3,000*l.*, furnishes an additional argument in favour of the Defendants. If then the Trusts are declared of 3,000*l.* only, the remainder of the Fund must be a resulting Trust for the personal Representative of Mr. *Ferrers*. *Norris v. Harrison* (b).

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Should, however, the Court be of opinion that the 3,000*l.* represented the whole Fund, then Mrs. *Courtney* had power, under her Settlement, to dispose of all the Monies to be received under the Policy, and the Defendants will be entitled to the whole of the Monies subject to the Plaintiff's Life Interest. The Plaintiff is estopped from denying this; for if he says that the whole Fund passed in the Settlement by the description of 3,000*l.*, he cannot contend that it did not pass by the same description in the Will. According to the Argument for the Plaintiff, if Mrs. *Courtney* had bequeathed the whole 3,000*l.* to her Uncles, the whole Fund would have passed; the consequence is the same when it is disposed of in distinct Sums.

If Mrs. *Courtney* had meant to give to her Father the whole of the Fund except the 2,000*l.*, which she had bequeathed to her Uncles, she would not have given him the 1,000*l.* expressly, but would have given the 2,000*l.* to her Uncles, and the remainder to her Father.

Admitting that there was no Residue for the Will to operate upon except the surplus Monies payable on the Policy, the residuary Bequest could not have the effect of cutting down a prior Gift.

The VICE-CHANCELLOR:—

The Defendants, in their character of personal Representatives of the Father, can have no title to any part of the Money recovered from The Equitable Assurance Office. All benefit of the Policy was assigned to the Trustees upon the Trusts expressed in the Settlement, which bore even date with the Assignment: and, according to the Trusts expressed in the Settlement, the only Child of the marriage became absolutely enti-

ted to all Monies which should, by virtue of the Policy, be received from the Insurance Office, subject only to the Father's Life Interest. When the second Settlement was made in contemplation of the Daughter's Marriage, it had not occurred to the Parties that, according to the rules of The Equitable Assurance Office, a much larger sum would be payable under the Policy than the original sum insured, and, in treating, therefore, of the Daughter's interest under the Father's Settlement, they describe it as a sum of 3,000*l.* But it is plain, whatever was the language used, that it was the intention of the Parties to comprise, in the Daughter's Settlement, her whole interest under the Policy of Assurance; and the effect must be the same as if more correct terms of description had been used in the Settlement. As the sum of 3,000*l.* was mentioned in the Settlement as descriptive of the Daughter's interest in the Policy of Assurance, so the Daughter uses the same term, as descriptive of the same interest, in her Will; and, when she divides that interest into thirds by the Gift of three equal sums of 1,000*l.* each, the words will pass to each Legatee an equal third of the whole benefit of the Policy. The Defendants, the Uncles, will, therefore, take the whole sum of 9,270*l.* subject to the Plaintiff's Life Interest: they take each one third as the immediate Legatees of the Daughter, and the other third they take as personal Representatives of the Father, who was the other Legatee.

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1827.
22d & 27th
February.

Landlord and
Tenant.
Equity.

A Tenant has no Equity to compel his Landlord to expend Money received from an Insurance Office, on the demised Premises being burnt down, in rebuilding the Premises, or to restrain the Landlord from suing for the Rent until the Premises are rebuilt.

LEEDS v. CHEETHAM.

BY Indenture, dated the 25th of March 1820, the Defendant demised to the Plaintiff a Cotton Factory, together with the Steam Boiler, Steam Engine, Steam Pipes and Gearing thereunto belonging, for Twenty-one Years, at the yearly Rent of 103*l.* 3*s.* 6*d.*: the Plaintiff covenanted to pay the Rent during the term, and to repair and keep repaired the inside of the Cotton Factory, and the Out-buildings and Offices thereto belonging, together with all Fixtures, Buildings, Improvements and Additions then or at any time during the continuance of the term erected or to be erected upon the Premises, and also the Steam Boiler, Steam Engine, Steam Pipes and Gearing, and all the Apparatus thereto belonging, so long as the same would last or could be rendered workable by repair. But when the same or any part thereof were quite worn out by long use, and were no longer workable, the Defendant was to replace them with new ones at his own expense, during the last fourteen years of the term: and the Defendant covenanted to maintain the outside Brick-work, Plastering, Slating, Tiling, and all other outer parts of the Premises, in good, substantial and tenantable repair, and at his expense during the last fourteen years of the term to replace or cause to be replaced the Steam Boiler, Steam Engine, Pipes and Gearing, and the Apparatus thereunto respectively belonging, with good and substantial new ones of the same size and description, when and as they should respectively become incapable of further use by long service, and could be no longer rendered

workable. There was no exception, in respect of accidents by Fire, either in the covenant for payment of the Rent, or in the covenant to repair.

On the 22d of June 1825, the Factory, Buildings and Premises were destroyed by Fire.

After the Lease was granted, the Defendant insured the Factory and Buildings for 500*l.*, the Steam Engine for 100*l.*, the Engine House for 60*l.* and the Gearing for 40*l.*; so that the total amount of the sums insured was 700*l.*: and, shortly after the Fire, he received that sum from the Insurance Office.

The Bill alleged that the 700*l.*, together with the old Materials, which were of the value of 350*l.*, were more than sufficient to rebuild and reinstate the Factory, Buildings, Steam Boiler, Steam Engine, Pipes, Gearing and Premises: that the Plaintiff was desirous that they should be rebuilt and restored; and that he was advised that he was entitled to have the 700*l.* applied for that purpose; but that the Defendant refused so to apply that sum, and that the Repairs he had done to the outside were colourable only, and so ineffectual that the Walls would not support the Machinery: that nevertheless he insisted on payment, by the Plaintiff, of the whole of the Rent, and had commenced an Action against the Plaintiff for a Year's Rent, ending on the 24th of June 1826. The Bill prayed that it might be declared that the Defendant was bound to lay out and apply the 700*l.*, or a competent part thereof, together with the old Materials, in and towards the rebuilding and reinstating of the Factory, Buildings and Premises, the Steam Boiler, Steam Engine, Pipes

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and Gearing thereof; and that he might be decreed forthwith to lay out and apply the same accordingly, the Plaintiff offering to make good, out of his own monies, what the 700*l.* and the old Materials should be insufficient for the purposes aforesaid, to such extent as he should be deemed liable thereto; and that it might also be declared that the Plaintiff was not bound to pay the Rent during such time as the Factory and Premises, and Steam Boiler, Steam Engine and other Machinery should continue unbuilt and unrestored; and that he might be discharged therefrom accordingly; and that, in the mean time, the Defendant might be restrained from further proceeding in the Action.

The Defendant demurred to the Bill, for want of Equity.

Mr. Spence, in support of the Bill, relied upon *Brown v. Quilter* (a). He also referred to the Comments, made upon that Case, by Macdonald, C. B. in *Hare v. Groves* (b), and to *Holtzapffel v. Baker* (c); and said that the consequence of refusing the relief sought by the Bill would be, that as often as the Defendant brought an Action against the Plaintiff for the Rent, the Plaintiff would bring a Cross Action against the Defendant for not repairing the outside of the Buildings, which Lord Northington, C. said would be very vexatious and endless, and introduce a kind of Equity (d).

Mr. Cooper, in support of the Demurrer, said that if the Equity contended for were to prevail, it would

(a) Amb. 619.

(c) 18 Ves. 115.

(b) 3 Anst. 687.

(d) Amb. 621.

encourage Tenants to let their Buildings get out of repair, and then to set fire to them : that, if part only of the Premises were destroyed by Fire, it would be impossible to determine what part of the Rent ought to be deducted until they were repaired : and he cited *Hare v. Groves* and *Holtzapffel v. Baker*, and particularly the following passage in the Argument for the Plaintiff in the last Case: " As to the distinction where the Landlord insured and received the value, it is extremely difficult to conceive how that distinct Contract, merely for the advantage of the Lessor, with which the Lessee has no concern, can affect the Right as between them."

The VICE-CHANCELLOR, after stating the substance of the Bill, proceeded as follows :—

To this Bill the Defendant has put in a general Demurrer ; and the question is, whether there is any ground of Equity to support the Bill. There being in the Lease no exception as to the case of accident by Fire, the Plaintiff at Law continues bound to pay his Rent ; he continues bound also, by his Covenant, to keep in repair the inside Work of the Factory, the Steam Engine, and the other Apparatus, and all the Out-buildings and Fixtures which were on the Premises. On the other hand, the Defendant, for want of the exception as to accident by Fire, continues bound by his Covenant to repair the outer part of the Buildings, and also by his Covenant to replace the Steam Boiler and other Apparatus during the last fourteen years of the term ; and when, from long use, they are no longer workable, under these Covenants, the Defendant is bound to rebuild the Factory, and to cover in the same with proper Roofing and Slating or Tiling ;

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and the Plaintiff is bound to rebuild the Out-buildings, and to do all necessary Works to complete the inside Work of the Factory when it is built and covered in by the Defendant. And clearly, at Law, the Plaintiff, having covenanted to pay his Rent during the whole continuance of the Lease, is not entitled to any suspension of the Rent during the time that will be occupied in the rebuilding and restoration of the Premises.

It appears to me that, in this respect, Equity must follow the Law. The Plaintiff might have provided in the Lease for a suspension of the Rent in the case of accident by Fire; but, not having done so, a Court of Equity cannot supply that provision which he has omitted to make for himself; and it must be intended that the purpose of the Parties was according to the legal effect of the Contract. With respect to the Equity which the Plaintiff alleges to arise from the Defendant's receipt of the Insurance Money, there is no satisfactory principle to support it. The Defendant having so contracted with the Plaintiff as to render himself liable to rebuild the outer Work of the Factory in case of accident by Fire, has very prudently protected himself by Insurance from the loss he would otherwise have sustained by such an accident. But upon what principle can it be that the Plaintiff's situation is to be changed by that precaution on the part of the Defendant, with which the Plaintiff had nothing whatever to do? The Plaintiff has sought his protection in the Contract by the Covenant which he has required from the Defendant; and to those Covenants must he alone resort.

In this case some embarrassment may arise from the singular Covenants as to the Steam Engine and other

Apparatus. The Plaintiff has covenanted to keep them in repair so long as they can be continued in use by repair; and the Defendant has covenanted to replace them with new Articles of the same description, at some time during the last fourteen years of the Lease, when they cease to be workable by repair. The literal effect of these mutual Covenants is defeated by the Fire. But the Parties will, no doubt, have the good sense to arrange between themselves what justice requires in this case, without the necessity of resorting to Cross Actions of Covenant. But, if not, the remedy is at Law, and this Court cannot interfere.

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Demurrer allowed..

WILLIAMS v. BROADHEAD.

2d & 8th March.

Practice.
Evidence.
Depositions.

THIS was a Tithe Suit instituted by a Vicar against an Occupier of Lands in the parish. The Plaintiff had obtained a Decree in a similar Suit in the Exchequer against another Occupier. The Defence made in both Suits was, that the Lands were discharged of Tithes by having belonged to the Abbot and Convent of Westminster. The Defendant had obtained, as of course, an Order that the Depositions of Witnesses who were still living, which had been taken in the latter Suit, might be read at the hearing of the former.

Mr. Duckworth, for the Plaintiff, now moved to discharge that Order for irregularity.

without any order of this Court for that purpose

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Mr. Boteler, for the Defendant, referred to *Coke v. Fountain* (a); *Hand's Pract.* 114; *Bishop of Hereford v. Cooper* (b); *Christian v. Wrenn* (c); and *Goodenough v. Alway* (d).

The VICE-CHANCELLOR:—

This Order has been obtained by the Plaintiff under a misapprehension of the Principles and Practice of the Court in such Cases.

Where there is Cause and Cross-cause, there the Order, which has been obtained here, is extremely useful; because it saves the necessity of examining the Witnesses in both Causes; and the Depositions are read, without more, as if taken in both Causes. But here the Parties, not being the same in both Causes, not the Depositions themselves, which the Court of Exchequer will not part with, but Office Copies of the Depositions are to be read, if at all, upon the principle that they are, in their nature, legal evidence, having regard to the subject of the two Suits; and the Plaintiff is entitled to read them as evidence, without any Order, upon production of the Office Copy of the Bill and Answer, for the purpose of showing that the same points were in issue in the first Cause. The Order which has been obtained will not relieve the Plaintiff from the necessity of the production of the Office Copies of the Bill and Answer and Depositions, and, serving no purpose whatever, the Order must be discharged, as improperly introduced upon the Records of the Court.

(a) 1 Vern. 413. (b) Bubn. 293. (c) Ibid. 321.
(d) 2 Sim. & Stu. 481.

CHARRETIE v. VAUSE.

1827.
21st February.

*Annuity.
Sale of Divi-
dends.*

BY an Indenture, dated the 16th of June 1821, made between the Rev. *John Vause*, Clerk, of the first part, *John Kendall*, Gent. of the second part, and the Defendant, *John Nicholson*, of the third part; after reciting an Indenture of Settlement of the 2d of April 1800, so far as regarded the Trusts thereby declared of 5,200*l.* Three per Cent Consolidated Bank Annuities therein mentioned, and that, under the Trusts of the recited Indenture, 12,800*l.* Three per Cent Consolidated Bank Annuities had been added to the 5,200*l.* like Bank Annuities, making together 18,000*l.* Three per Cent Consolidated Bank Annuities, which were then standing in the names of *Edward Wilbraham Bootle*, *George Case*, and *Ralph Fisher* the younger, the Trustees of the Indenture of Settlement, in the Books of the Governor and Company of the Bank of England, and to the Dividends and annual Produce of which the said *John Vause* was entitled, during his life, under or by virtue of the said Indenture of Settlement, free from any incumbrance whatsoever; and also reciting that the said *John Kendall* had then lately contracted and agreed with the said *John Vause* for the purchase of the annual sum of 150*l.*, part of the yearly Dividends of the said 18,000*l.*, Three per Cent Consolidated Bank Annuities, so vested in the names of the said Trustees as aforesaid, for and during the natural life of the said *John Vause*, for the price or sum of 1,100*l.*, but no part of the said Purchase Money had been then paid, nor had any assignment of the said annual Sum been made, pursuant to the said

An Assignment of 150*l.*, part of the Dividends of a sum of Stock to which the Vendor was entitled for life, with a proviso that the Purchaser should not receive any part of the Dividends then growing due, but a proportionable part of the 150*l.*, is a grant of an Annuity to that amount, and must be memorialized.

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recited Contract; and also reciting a Policy of Insurance, effected by the said *John Kendall* on the life of the said *John Vause*, in The European Life Insurance Office, for the sum of 1,300*l.*, and that the said *John Kendall* had contracted and agreed, with the Defendant *Nicholson*, for the sale to him of the said annual sum of 150*l.*, during the natural life of the said *John Vause*, for the price or sum of 1,300*l.*, and had agreed with *Nicholson* to assign to him the said Policy of Insurance, upon his paying to the said *John Kendall* the Premium paid by him to the said Insurance Office: It was by the said Indenture witnessed that, in pursuance of the said recited Contracts and Agreements, and in consideration of 1,100*l.* by the direction of the said *John Kendall* paid by the said *John Nicholson* to the said *John Vause*, and of 200*l.*, making together 1,300*l.* to the said *John Kendall* also paid by the said *John Nicholson*, the said *John Vause*, with the consent and approbation of the said *John Kendall*, assigned, transferred and set over, and the said *John Kendall* ratified and confirmed unto the said *John Nicholson*, his Executors, Administrators and Assigns, all that the clear yearly sum of 150*l.*, being part of the Dividends arising from the said 18,000*l.*, Three per Cent Consolidated Bank Annuities, standing in the names of the said Trustees in the Books of the Governor and Company of the Bank of England as aforesaid, and all the Right, Interest, Property, Claim and Demand whatsoever, at Law and in Equity, of the said *John Vause*, in, to and out of the said annual sum or yearly Dividends of 150*l.*, and every part thereof, together with all powers, remedies and means whatsoever, requisite or necessary for suing for, recovering, receiving and giving effectual releases and discharges for the same: To hold, receive, take and enjoy the said annual

sum of 150*l.*, of the said Dividends of the said Bank Annuities, unto the said *John Nicholson*, his Executors, Administrators and Assigns, thenceforth for and during the natural life of the said *John Vause*, to be paid and payable half-yearly, when and as the said Dividends should be payable at the Bank of England, and the first half-yearly payment thereof to be made at the next payment of Dividends on the said Bank Annuities, at the Bank of England, after the date of the said Indenture, save and except that, as there would be only one month's interest, amounting to 12*l. 10s.*, due to the said *John Nicholson*, in July then next, being the time when the said Dividends would become payable, it was agreed that the said *John Nicholson* should receive such sum of 12*l. 10s.* at that time only, and afterwards should have, receive and take the whole of the said annual sum of 150*l.*, part of the said Dividends of the said 18,000*l.*, Three per Cent Consolidated Bank Annuities, by half-yearly payments, as they should become due, as aforesaid: And the said *John Vause* thereby authorized and directed the said *E. W. Bootle*, *George Case*, and *R. Fisher* the younger, or the Survivors or Survivor of them, or the Executors or Administrators of such Survivor, or the Trustees or Trustee for the time being of the said recited Indenture of Settlement, from time to time, during the life of the said *John Vause*, to pay the said annual sum of 150*l.*, part of the Dividends of the said 18,000*l.*, Three per Cent Consolidated Bank Annuities, standing in the names of the said Trustees as aforesaid, or otherwise to empower the said *John Nicholson*, his Executors, Administrators or Assigns, to receive the said annual sum when and as the said Dividends should become due and payable: and the said *John Vause* did thereby covenant with the said *John Nicholson* that he had good

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right to assign the 150*l.*, part of the Dividends of the said 18,000*l.* Bank Annuities, unto the said *John Nicholson*, his Executors, Administrators and Assigns, during the life of the said *John Vause*, in manner aforesaid; and that it should be lawful for the said *J. Nicholson*, his Executors, Administrators and Assigns, from time to time, during the natural life of the said *John Vause*, to receive and take the said annual sum of 150*l.*, part of the Dividends of the said 18,000*l.* Three per Cent Consolidated Bank Annuities, when and as the said Dividends should become due and payable, the first payment of 12*l.* 10*s.*, being the proportionable part of such annual Sum as aforesaid, to become due and payable at the next payment of Dividends on the said Bank Annuities, at the Bank of England, after the date of the said Indenture: and the said *John Vause* covenanted in the usual manner for further assigning and assuring the said annual sum of 150*l.*, part of the said Dividends, unto the said *J. Nicholson*, his Executors, Administrators and Assigns, during the life of the said *John Vause*. And the Indenture also contained an assignment, from the said *John Kendall* to the said *J. Nicholson*, of the said Policy of Assurance effected by him on the life of the said *John Vause*.

On a Motion being made, in this Cause, for payment of the Dividends of the 18,000*l.* Stock into Court, the Parties consented that the Court should decide whether the above transaction was a sale of part of the Dividends of the Stock, or a grant of an Annuity: in which latter case it was void for want of a memorial.

Mr. Shadwell and Mr. Wilbraham, for the Defendant *Nicholson* :—

The question is, whether this is an assignment of an annual Sum, part of the Dividends of the Stock, or a grant of an Annuity secured on the Dividends. If the Parties had intended that it should be the latter, this mode of transaction would not have been adopted; but the Deed would have contained a grant of the Annuity, and an assignment of the Dividends to a Trustee to secure the Annuity. The Deed recites that *Nicholson* contracted for the purchase of a part of the Dividends, and the Deed is an assignment of the Dividends. The Grantee is subject to all the consequences to which the Dividends are liable; and if the whole income of the Fund had been assigned to different persons, and the Dividends had been afterwards reduced, *Nicholson* could not have made the other Assignees bear the whole loss, but must have borne his proportion of it.

In grants of Annuities there is always a provision for payment of a proportionable part in case of the Grantee dying between any of the days of payment. Here there is no such provision. *Browne v. Like* (a).

Mr. Sugden and Mr. Lynch, contra:—

It has been said that this is not an Annuity, because the Deed is not, in form, a Grant. In Annuity transactions there is no actual Grant, except where the security is a Freehold or a Leasehold Estate. When the Annuity Act speaks of a grant of an Annuity, it means an Annuity in whatever manner secured, whether by Bond, Covenant, or otherwise.

(a) 14 Ves. 302.

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There is nothing in this Deed to show that, if the Dividends are reduced, the Grantee must bear his proportion of the loss. If the seller had intended that to be the case, he would have assigned to *Nicholson* a certain proportion of the Dividends, instead of a specific sum of 150*l.*

As to there not being a stipulation for payment of a proportionable part of the Annuity, there is here such a stipulation; only it is inserted at the commencement of the period for which the Sum is to be paid, instead of at the end of it. This stamps the Grant with the character of an Annuity.

Then there is an assignment of a Policy of Insurance on the Grantor's Life. And in all cases of purchases of Annuities, the Purchasers take care to have their principal secured; as they consider it, not so much a Purchase, as a Loan at a certain sum per cent. The decision in *Browne v. Like* proceeded on the ground that the transaction was a Sale out and out. That decision was directly against the opinion expressed by Lord *Rosslyn*, C. in *Duke of Bolton v. Williams* (b). If this Deed had been a sale of Dividends, *Nicholson* would have been entitled to receive them in July 1821; but it is expressly stipulated that he shall receive 12*l.* 10*s.*, for Interest, instead of those Dividends. *Hood v. Burlton* (c) is precisely in point.

Mr. *Shadwell*, in reply:—

No intention to make the Grantor personally liable to pay the Annuity, can be collected from this Deed.

There is not only no Grant, but no covenant to pay the Annuity. The stipulation as to the payment of 12*l.* 10*s.* shows that the Parties contemplated that, but for that provision, the July Dividends would have passed. The opinion alluded to in *Duke of Bolton v. Williams* is considered not to be Law; and in *Hood v. Burlton, Burlton* covenanted to make up any deficiency in the Funds.

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The VICE-CHANCELLOR:—

The single question here is, whether this Deed is, substantially, a grant of an Annuity of 150*l.* a year, for the life of Mr. *Vause*, secured by the Dividends of a sum of 18,000*l.*, Three per Cent Consols, or is only an assignment of such a proportion of those Dividends as the sum of 150*l.* bears to the whole annual amount of those Dividends.

The form of the expression used in the Deed is immaterial. Now it is clearly not a sale of a proportion of those Dividends; because the Deed, being executed in the month of June, it is specially provided that the Grantee shall not take such a proportion of the July Dividends as the sum of 150*l.* bears to the whole amount, but the sum of 12*l.* 10*s.* only, being, in the language of the Deed, the proportionable part of the annual sum of 150*l.* which would be due and payable at the time. This circumstance is decisive that it is not a sale of a proportion of the Dividends, but a grant of an annual sum of 150*l.* for the life of Mr. *Vause*. The Case of *Hood v. Burlton* is in point, both as to the form of the expression used, and the principle of the decision. And *Browne v. Like* is plainly distinguishable, being, in form and in substance, the sale of proportion of the Life Interest.

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16th & 17th
March.

Consideration.
Specialty Cred-
itor.

A grant of an Annuity to the Grantor's Sister, though expressed to be made for natural love and affection, may be proved to have been made in consideration of her Marriage, and will entitle her to rank as a Specialty Creditor of the Grantor.

A Husband made a post-nuptial Settlement of 4,000*l.* in favour of his Wife and Children, and then in consideration of the 4,000*l.*, expressed to have been lent to him by the Trustees of the Settlement, made a Mortgage to them of a Real Estate to secure that Sum, and covenanted to repay it. The Husband never, in fact, paid the 4,000*l.* to the Trustees: Held, nevertheless, that they were Specialty Creditors of the Husband.

TANNER v. BYNE.

THE Plaintiff was a Specialty Creditor of *Henry Byne*, deceased; and the object of the Bill was to have the deceased's Personal Estate applied in payment of his Debts. The usual Decree having been made, the Master reported to the following effect:—

That by an Indenture, dated the 22d of September 1807, made between the deceased, of the first part, *Ann Isabella Augusta Byne*, his Sister, of the second part, and *Humphry John Norris Bawden*, and *John Burgess Karslake* the younger, of the third part, the deceased, in consideration of his natural love and affection for his Sister, and for making a permanent provision for her during her life, granted to her, for her life, an Annuity of 50*l.*, charged upon certain Lands in the County of *Surrey*, therein described, to commence from the 29th of September 1807; and, for himself, his Heirs, Executors and Administrators, covenanted with her to pay the Annuity accordingly: that, before the date and execution of the Annuity Deed, a Marriage had been agreed upon, and was afterwards solemnized, between *Richard Bawden* and *Ann Isabella Augusta Byne*; that, upon the treaty for the same, the deceased agreed to make a Provision or Settlement for his Sister, and did, in consider-

Payne, Martimer, & Son, 468.

ation of the Marriage, and of his natural love and affection for her, grant to her the Annuity of 50*l.*: that, as a further Provision for her on her Marriage, he did, by an Indenture of Settlement, bearing even date with the grant of the Annuity, and made between him of the first part, his Sister of the second part, *Richard Bawden* of the third part, and *Humphry John Norris Bawden*, and *John Burgess Karslake* the younger, of the fourth part, assign (amongst other things) to *Humphry John Norris Bawden*, and *John Burgess Karslake* the younger, the sum of 500*l.*, secured to him upon mortgage of certain Lands in the County of *Surrey*, upon trust to pay the Interest thereof to his Sister, for her separate use, for her life, and, after her decease, to *Richard Bawden*, for life, and, after his decease, the Trustees were to stand possessed of the 500*l.*, upon trust for the Issue of the Marriage, as therein mentioned. The *Master* also found that the Defendant, who was the Widow and Administratrix of the deceased, by her Affidavit stated that, by Indentures of Lease and Release, dated the 28th and 29th of September 1800, made between the deceased, of the first part, *Ann Isabella Augusta Byne*, of the second part, *John Hubbersty*, of the third part, and *William Barry Wade*, of the fourth part, for the consideration of natural love and affection the deceased granted, unto or for the use of *Ann Isabella Augusta Byne*, an Annuity of 50*l.* for her life, and that that Annuity was duly paid accordingly, as the Deponent believed; and that a Marriage took place, in the month of September 1807, between *Ann Isabella Augusta Byne* and *Richard Bawden*; that, at the time of such Marriage, and for a long time previously thereto, the Indentures of the 28th and 29th of September 1800

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were in the possession of *Hubbersty*, and the same could not then be obtained; whereupon the deceased granted the Indenture of September 1807, in lieu of the Annuity granted in September 1800, and that the Annuities were one and the same, and that the Indentures of the 28th and 29th of September 1800 had since been delivered to the deceased, and were then in the Deponent's possession; and that, at the time of the grant of the first-mentioned Annuity, *Ann Isabella Augusta Byne* was not known, as the Deponent believed, to *Richard Bawden*, and that it was not granted in consideration of any Marriage then in contemplation, but was entirely voluntary on the part of the deceased: And that the Deponent further stated that, in contemplation of the Marriage between *Ann Isabella Augusta Byne* and *Richard Bawden*, the deceased transferred, unto or for their benefit, a Mortgage for 500*l.*; and she, the Deponent, and the deceased granted another Annuity of 30*l.*, which had since ceased: that upon these grounds *Richard Bawden* and *Ann Isabella Augusta*, his Wife, claimed to be due to them, under the Indenture of the 22d of September 1807, the Arrears of the Annuity of 50*l.* from the 29th of September 1821 (up to which time the same was paid) to the 25th of March 1825. The *Master* added that he had considered of this Claim, and the Evidence in support of it, and found that, under the Covenant contained in the Indenture of the 22d of September 1807, Mr. and Mrs. *Bawden* were Specialty Creditors on the Estate of the deceased, (the Court having declared that the Intestate had no title to the Estate charged with the payment of that Annuity); and that the Sum claimed by them for Arrears was due to them.

Mr. and Mrs. *Bawden*, by their Affidavit (which the *Master* referred to in his Report) deposed that, some years previous to their Marriage, the Intestate agreed or promised to settle an Annuity of 50*l.* on or in Trust for Mrs. *Bawden*; and that she believed that one or more Deed or Deeds, for that purpose, was or were prepared, but, whether such Deed or Deeds bore date on or about the 28th and 29th of September 1800, or was or were ever executed by the Intestate, she could not set forth: that she occasionally resided with the Intestate previous to her Marriage, and that she was, at times, furnished with small sums of money by him, but, according to her recollection and belief, she did not, on her own account, receive from him, between the 28th and 29th of September 1800 and the day of her Marriage, any sum or sums of Money (after deducting the sum of 100*l.* which the Intestate promised to bestow on her as a Wedding Present), which, collectively, would amount to a sum equal to an Annuity of 50*l.*, from the 29th of September 1800 to the 22d of September 1801; nor did she ever imagine or consider that such sums so received by her were paid in liquidation, or discharge, or in lieu of the Annuity of 50*l.*, but (with the exception of the sum of 100*l.*) as the gratuitous presents of the Intestate: that, upon the treaty for her Marriage, the Intestate agreed to settle 100*l.* per annum on her in manner following, (that is to say) 50*l.*, part thereof, for her life, was to be charged on certain lands in the County of *Surrey*; 30*l.*, other part thereof, during the joint lives of herself, the Intestate, and his Widow, was to be charged on certain lands in the County of *Devon*; and 20*l.*, the residue thereof, for the life of Mrs. *Bawden*, was to be paid out of the interest of a sum of 500*l.*, due to the Intestate on

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Mortgage: that Deeds to effectuate such the intention of the Parties were accordingly prepared and executed; and that the Annuity of 50*l.* so agreed to be, and actually settled on the Marriage of the Deponent, was not in lieu of the Annuity of 50*l.* said to be settled, or agreed to be settled by the Deeds of the 28th and 29th of September 1800, but was in consideration of the Deponent's Marriage, and of the Intestate's natural love and affection for her: That not only the Interest of the 500*l.* due on Mortgage, but also the principal sum of 500*l.* was also settled on the Marriage; and that, on the Treaty for the Marriage, Mr. *Bawden* agreed to convey and settle divers Lands in the Counties of *Devon* and *Somerset*, which were settled accordingly; and that the Property so settled by him was of the yearly value of 250*l.* and upwards.

The Assets not being sufficient to pay all the Intestate's debts, the Plaintiff excepted to the Report, on the ground that the Covenant in the Indenture of the 22d of September 1807, was voluntary on the part of the Intestate, and not supported against his Creditors by any good or valuable consideration.

Mr. *Heald*, and Mr. *Teed*, in support of the Exception.

The Assets being deficient, it is important that the Claim of Mr. and Mrs. *Bawden* should be brought under the consideration of the Court, in order that it may be decided whether the Debt they claim ought to be preferred to the Intestate's simple-contract Creditors. The Deed of September 1807, is, on the face of it, purely voluntary. At the time that Deed was executed the Marriage had been agreed upon; and it contains no allusion whatever to the Marriage. It appears by

the Affidavit of Mr. and Mrs. *Bawden* that this Deed was not made in lieu of the Deeds of the 28th and 29th of September 1800; the *Master* reports that those Deeds were not lost; nor were there any Arrears of the Annuity secured by those Deeds due at the time the Indenture of September 1807 was executed. This case therefore does not fall within the principle of *Gilham v. Locke* (a). But, supposing that the Deed of 1807 was made in lieu of the Deeds of 1800, as the latter were voluntary, the former also must be voluntary.

Mr. *Knight*, in support of the Exception.

The *Master* does not state the contents of the Defendant's Affidavit, as facts, but merely as statements. The facts he finds are that, at and before the date and execution of the Grant of the Annuity, a Marriage had been agreed upon between Mr. and Mrs. *Bawden*, and that it was afterwards solemnized. This Grant therefore was made for a valuable consideration. The next Deed is strictly a Marriage Settlement, and bears even date with the Grant, and the husband is a party to it. Both Deeds therefore are but one transaction; and they are both supported by the consideration of Marriage. But, supposing that the Grant of 1807 were a substitution for that of 1800, still, on the authorities of the Duke of *Wharton's Case* (b), *Jones v. Boulter* (c), and *Gilham v. Locke* (d), it would be founded on a valuable consideration.

Besides, although the Grant purports to be made for natural love and affection, a valuable considera-

(a) 9 Ves. 612.

(b) *Stikes v. The Attorney-General*, 2 Atk. 152.

(c) 1 Cox, 288. (d) 9 Ves. 612.

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tion *dehors* the Deed may be proved. *Chapman v. Emery* (e).

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It is not necessary that the Grant should have been made in consideration of the Marriage; for if in consequence of the Grant a change in the circumstances of the Grantee, such as Marriage, takes place, it can not be afterwards questioned (f). It can not be contended that Mr. *Bawden* did not know of the Grant of the Annuity: and he swears that on the Treaty for the Marriage he agreed to make a Settlement of certain Lands in *Devon* and *Somerset*, and that such Settlement was afterwards made accordingly.

Mr. *Heald* in reply:—

Mr. and Mrs. *Bawden* being interested Parties cannot support the Deed by their Evidence. The fact that the Husband is a Party to one of the Deeds and not to the other, so far from showing that the considerations of both were the same, proves that they were different.

The exception was over-ruled by the Vice-Chancellor, who stated that the consideration of Marriage, being consistent with the alleged consideration of natural love and affection, might be averred, though not found in the Deed, and well supported the *Master's* finding.

(e) *Cowp.* 278; and see *Rex v. Inhabitants of Scammonden*, 3 T. R. 474.

(f) *Kirk v. Clark*, Prec. Cha. 275; S. C. 2 Eq. Ab. 165. *East India Company v. Clavell*, Gilb. Eq. Rep. 37; Prec. Cha. 377. *Brown v. Carter*, 5 Ves. 862. *Crofton v. Ormsby*, 2 Scho. & Lef. 583: & *George v. Milbanke*, 9 Ves. 190; see particularly 193.

Another claim before the *Master* arose out of the following circumstances. By Indenture, dated the 19th of November 1793, the Intestate, *Henry Byne*, in consideration of the love and affection which he bore to *Mary Anne Byne*, his first Wife, who was a Party to the Deed, and in consideration of 10*s.* covenanted with *Charles Pointz* and *William Barry Wade* that he would, within three months from the date of that Indenture, invest the Sum of 4,000*l.* in the Public Funds, in trust to pay the Dividends to the Intestate, during his Life, and, after his death, to his Wife, *Mary Anne Byne*, for her Life, and, after the death of the Survivor, to divide the Funds, in equal Shares, between the Children of the Marriage.

By another Indenture, bearing date the 14th of November 1796, made between the Intestate, of the one part, and *Pointz* and *Wade* of the other part, reciting that *Pointz* and *Wade* had, that day, lent 4,000*l.* to the Intestate, the Intestate demised to them certain Lands and Hereditaments, in the Parish *Carshalton in Surrey*, for 2,000 years, subject to redemption on re-payment of that Sum with Interest on the 14th of May then next; and the Intestate covenanted to repay it accordingly. By a Deed Poll, bearing date the 29th of November 1796, indorsed on the last-mentioned Indenture, and made between the same Parties, and reciting the Settlement of the 19th of November 1793, the Trustees agreed and declared that they would stand possessed of the 4,000*l.* secured by the Mortgage, upon the trusts of the Settlement. *Mary Anne Byne* died before the year 1821, but there was issue of the Marriage three children, who were then living. The Intestate had, in his life-time, been deprived of the Mortgaged Estate, by a decree of the Court of Chancery. But the *Master* found that, under

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the several Indentures before stated, there was due to *Wade*, the surviving Trustee, as a Specialty Creditor upon the Estate of the Intestate, the Sum of 4,000*l.* and Interest from the Intestate's decease.

To this finding of the *Master* also an Exception was taken, by the Plaintiff, on the ground that the Deeds on which the claim was founded were voluntary, and not supported by any good or valuable consideration.

It was admitted by Mr. *Simpkinson*, who appeared in support of the *Master's* finding, that, in point of fact, the 4,000*l.* had never been paid by the Intestate to the Trustees.

Mr. *Heald*, and Mr. *Teed*, in support of the Exception, said that, as the 4,000*l.* had never been paid, the Deed of 1793 was a mere post-nuptial Settlement; and that, if it were held good against the Creditors, a person who wished to defraud his creditors need only, in future, make a voluntary Settlement, and, when the money secured by it became due, make another Deed in consideration of the money due on the former.

Mr. *Simpkinson*, *contra*, was stopped by the Court.

The VICE-CHANCELLOR:—

If the 4,000*l.* had been, in fact, paid by the Intestate to the Trustees, it is not disputed that, although the Settlement of the 19th of November 1793 was subsequent to the Marriage and merely voluntary, the *Master's* finding would have been fully justified; and the Trustees, having lent the money to the Intestate, would have been duly constituted Specialty Creditors by the

Indenture of the 14th of November 1796. But it is contended that the money, not having been, in fact, paid by the Intestate to the Trustees, the second Indenture is to be considered, like the first, as purely voluntary, and constituting no debt in competition with Creditors. It appears to me that the transaction is, substantially, the same as if the 4,000*l.* had been actually paid by the Intestate, and then returned to him by way of Loan.

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Exception overruled.

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20th & 21st
March,
and
25th April.

Feme Coverte.
Parent & Child.

BY the Decree made in this Suit, which had been instituted for the administration of an Intestate's Estate, to a share of which the Plaintiff *Fenner* was entitled in right of the other Plaintiff, his Wife, who was one of the Intestate's next of kin, it was referred to the *Master* to inquire whether *Fenner* had made any and what Settlement on his Wife and the Issue of their Marriage, or had entered into any Contract or Agreement for that purpose. The *Master* reported that, shortly after the Marriage, *Fenner* had an interview with the Defendant, *Taylor*, the Husband of the Administratrix, touching his Wife's Fortune, and that, at such interview, *Fenner* told *Taylor* that he intended to settle one half of his Wife's Fortune on herself, and that, on the 22d of December 1810, *Fenner* wrote and signed, in *Taylor*'s presence, a Memorandum or Agreement, as follows:—

“ London, 22d December 1810. Memorandum: I do hereby agree that one half of the Property to which Mrs. *Fenner* is entitled shall be secured upon herself.”

The Husband of a Woman entitled to a Fund in a Cause signed, after the Marriage, a written Agreement that he would settle half the Wife's Fortune upon her: Held that the Agreement enured to the benefit of the Children of the Marriage, and that, therefore, the Wife could not waive it.

Reversed. 2 P. 4
May 190.

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And the *Master* also found that *Fenner*, on the 27th of the same month, sent to the Defendant *Taylor* a Letter, in the words following :—" Mr. *Fenner* presents his Compliments to Mr. *Taylor*, and informs him that he has consulted with his legal Advisers on the subject of the proposed Settlement, and that they are decidedly of opinion that Mr. *Taylor's* Solicitor is the proper person to prepare the necessary Writings, a Draught of which it will be requisite to transmit for their perusal, describing fully the nature and extent of all Properties to which Mrs. *Fenner* now is or will be, at any future period, entitled." And the *Master* found that a Draft of a Deed of Settlement was prepared by *Taylor's* Solicitor, and sent to the Solicitor of the Plaintiffs for their approbation ; but such Draft had never been returned approved, nor had any Settlement been executed. And the *Master* found that *Fenner* had not made any Settlement on his Wife and the Issue of their Marriage, nor entered into any Agreement for that purpose, except the Agreement and Letter before set forth.

Mr. and Mrs. *Fenner* had Children living ; but they were not Parties to the Suit.

The Cause now coming on for further directions, it was stated that Mrs. *Fenner* was desirous of waiving her right to the Settlement so agreed to be made by her Husband ; and the question was, whether she could be permitted to do so.

Mr. *Heald*, and Mr. *Rouppell*, for the Plaintiffs :—

Although the Court will not undo what has been completed, yet, where a matter remains in Agreement, and that made without consideration, the Court will not

enforce it. The Wife is the only person who is intended to be benefited by this Agreement. On what principle then can it be held that she is not entitled to waive it? If her right to a Settlement had been derived under the order of this Court, she might have waived it, although the order extends to the children. *Murray v. Lord Elibank* (a). In a case, like the present one, which came before Sir W. Grant, M. R. but which is not reported, the Wife was allowed to waive her right to a Settlement.

Mr. Hart and Mr. Treslove for the Defendants, cited *Thompson v. Attfield* (b), *Ex parte Gardner* (c), *Colman v. Sarrel* (d), and *Pulvertoft v. Pulvertoft* (e).

The VICE-CHANCELLOR:—

It is now fully settled that, after the order of this Court for the Husband to lay a proposal before the Master, if the Wife die while the matter rests in proposal, without waiving her right to a Settlement, the Settlement must be made for the benefit of the Children: but if the Wife thinks fit, after order made, while the matter rests in proposal, to waive the Settlement, she may give the property to the Husband, and thereby defeat the Interests of the Children. The question is whether there is a substantial difference between a proposal made under the usual order, and the Agreement of the Husband, which is found in this case. It is first observed in the Argument for the Plaintiff, that the Agreement here is merely for the benefit of the Wife, and not for the Children, and, therefore, the Children are here out of the question. To try this, let it be supposed that the Wife did not

(a) 10 Ves. 84; & 13. 1. (b) 1 Vern 40.
(c) 2 Ves. 671. (d) 1 Ves. J. 50. (e) 18 Ves. 84.

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and Assigns, upon Trust, at any time within seven years after the decease of his Wife, or as they should think proper and most advantageous, to sell the same : and he directed that the Monies to be produced by the Sale should sink into, and become part of his general Personal Estate; and he also directed that, after the decease of his Wife and until the Hereditaments directed to be sold should be sold, the Rents and Profits thereof should be paid and applied to and for the benefit of the persons who would, under his will and the Trusts therein declared, be entitled to the Income of the Monies to be produced by the Sale of the same Hereditaments, in case such Sale had been then actually made, and in the same shares and proportions. Also he gave to the same four Persons, their Heirs and Assigns, his Messuage or Mansion House, called *Penn Park*, with the Gardens, Coach-houses, Stables and other Appurte-
nances thereto, situate at *Charlton*, in the parish of *Westbury-upon-Trym*, in the County of *Gloucester*, and all his Farms, Messuages, Lands and Hereditaments, situate in the Parish of *Westbury-upon-Trym*, and also in the Parishes of *Henbury* and *Filton*, in the County of *Gloucester*, as well in his own occupation as in the tenure or occupation of any Tenant or Tenants ; and also all his Messuages, Farms, Lands, Tenements, Woods and Hereditaments in the Parishes of *Horton*, *Yate*, *Berkely*, *Hawkesbury* and *Iron Acton*, or else-
where in the County of *Gloucester*, and in the Parishes of *Pembridge* and *Kimbolton*, or elsewhere in the County of *Hereford*, and all the Messuages, Farms, Lands and Hereditaments which he had agreed to purchase, and which should not have been conveyed to him at the time of his decease ; and all other the Messuages, Farms, Lands, Tenements and Real Estate, whatsoever

and wheresoever situate, belonging to him, either at Law or in Equity, or over which he had any power of appointment or other disposition; or in which he had any devisable Estate or Interest, (except his Estate, Right and Interest in such Real Estate as he had thereafter devised to other persons), to hold all the said several Estates, Lands and Hereditaments so by him devised to the said four persons (except his said Messuage and Hereditaments in *Saint James's Square* aforesaid) unto and to the use of them, their Heirs and Assigns for ever, upon Trust; as to his Messuage or Mansion House, called *Penn Park*, and the Gardens, Coach-houses, Stables, Buildings, and Appurtenances thereto, and such of his Lands or Grounds as he himself held and occupied with that Messuage or Mansion House, and which were all situate in the Parish of *Henbury*, to permit and suffer his Wife to reside in and occupy the same during her natural life; and upon Trust, after her decease, out of the Rents, Income and Profits of all his said Trust Estates thereby devised (except his Messuage and Hereditaments in *St. James's-square* aforesaid), to retain an Annuity of 300*l.*, during the natural life of his Nephew *George Bengough*, and to pay it to his said Nephew *George Bengough*, during his life; and, upon further Trust, after the decease of his said Wife, out of the Rents, Income and Profits of his said Trust Estates, to retain an Annuity of 200*l.* during the natural life of his Nephew *Henry Bengough*, and pay it to his Nephew *Henry Bengough*, during his life; and, subject to the payment of those respective Annuities, and otherwise subject as thereinbefore mentioned, upon Trust, that the Trustees should, from time to time during the term of twenty-one years to be computed from the day of his decease, receive the Rents, Issues

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and Profits of all his real Estates devised to them in Trust as aforesaid, and, subject to the payment of the Annuities of 4,000*l.*, 300*l.* and 200*l.*, from time to time during the continuance of the term of twenty-one years, lay out and invest the Monies to arise from such Rents, Issues and Profits in the purchase of Freehold Estates of inheritance, in fee-simple, in *England*, as often as there should be a Surplus in hand arising from the receipt of such Rents, Issues and Profits, amounting to the sum of 1,500*l.*, after paying the Annuity of 4,000*l.*, either out of the Rents of his real Estates, or out of the Income of his personal Estate, or out of both those Funds, and also after paying the Annuities of 300*l.* and 200*l.* out of the Rents of his real Estates; and he directed that such Freehold Estates of Inheritance so to be purchased should, from time to time, be conveyed and assured unto and to the use of the Trustees for the time being of his Will, upon the same Trusts, and for the same ends, intents and purposes, and subject to the same powers, provisoies and conditions as were "thereinafter" limited and expressed concerning the Messuages, Lands, Tenements, Estates and Hereditaments by him thereinbefore devised unto and to the use of the said Trustees, their Heirs and Assigns: and he directed that his Trustees should never permit a larger sum than 500*l.*, arising from the Rents and Profits of his real Estates, to remain at any one time in the hands of any Banker; but that, when there should be 500*l.* in hand, it should be laid out in the purchase of Three per cent Consolidated Bank Annuities, in the names of the Trustees for the time being, until a convenient purchase could be found: and he directed that the Interest, Dividends and Income of such Bank Annuities should, during the term

of twenty-one years, and no longer, accumulate, in the same manner, and for the same purposes as the Rents and Profits of his real Estates, so to be purchased as before mentioned, were by him directed to accumulate.

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And as to all the Trust Estates and Hereditaments by him devised as aforesaid (except his Messuage and Hereditaments in *St. James's-square*) upon Trust that the Trustees should retain and stand possessed of them during the term of one hundred and twenty years, to commence from his death, if his Nephews George Bengough and Henry Bengough, his Nephew James Bengough, his Great Nephews Henry Ricketts, the younger, and Richard Ricketts, the younger, his Niece Ann Elizabeth Bengough, his Great Niece Ann Ricketts, the younger, thereafter named, the Ten Children then living of Charles Lucas Edridge (for whose names a blank was left in the Will), and the Eleven Children then living of Arthur Palmer, (whose names were mentioned,) or any or either of his said Nephews and Niece, and Great Nephews and Great Niece, or any or either of the said several Children of the said Charles Lucas Edridge and Arthur Palmer, should so long live, and also during the term of twenty years, to be computed from the expiration or other sooner determination of the term of one hundred and twenty years, nevertheless in Trust for the person and persons thereafter mentioned, and for the respective times thereafter expressed, (that is to say,) upon Trust for his Nephew George Bengough for a term of ninety-nine years, if he should so long live, and the terms of one hundred and twenty years and twenty years, or either of them, should so long continue; and, after the determination of the term of ninety-nine years, in trust for the

*120 years of 20 years
the longer live.*

5/20 years

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first, second, third, fourth, fifth, sixth, and all and every other and subsequent born Sons of the same *George Bengough*, successively, according to the priority of their births; and, after the determination of the Estate and Interest of each of the same Sons respectively, and also, as the circumstances of the case should require, after the determination of the Estate of any person taking from time to time under, or as answering the description of Heir Male of his Body, In trust for the person who, for the time being, and from time to time, should answer the description of Heir Male of his body, or who, in case of the death of his Parent, if such death had taken place, would be Heir Male of his body under an Estate Tail limited to the same Son and the Heirs Male of his body, to hold to the same Son or Person respectively for a term of ninety-nine years, if the same Son or Person should so long live, and the said terms of one hundred and twenty and twenty years, or either of them, should so long continue, every elder of the same Sons, and the person who for the time being and from time to time should answer, or, in case of the death of his Parent, if such death had taken place, would answer the description of Heir Male of his body, to be preferred before every younger of the same Sons and the person who, for the time being, should answer, or, in case of the death of his Parent, if such death had taken place, would answer the description of Heir Male of his body; and, after the determination of the respective Estates and Interests of the first and every other subsequent born Sons of the same *George Bengough*, and of the person who, for the time being, should be, or who, in case of the death of his Parent, would be Heir Male of the body of the same Sons respectively, then in trust for his said Nephew *Henry Bengough*, for a term of

of ninety-nine years, if he should so long live, and the said terms of 120 years and twenty years, or either of them, should so long continue: And, after the determination of the last-mentioned term of ninety-nine years, in trust for the first, second, third, fourth, fifth, sixth, and all and every other subsequent born Son of *Henry Bengough*, successively, according to the priority of their births; and, after the determination of the Estate and Interest of each of the same Sons of *Henry Bengough* respectively; and also, as the circumstances of the case should require, after the determination of the Estate of any person taking from time to time under or as answering the description of Heir Male of his body, In trust for the person who, for the time being, and from time to time, should answer the description of Heir Male of his body, or who, in case of the death of his Parent, if such death had taken place, would be the Heir Male of his body under an Estate Tail limited to the same Son and the Heirs Male of his body, to hold to the same Son of *Henry Bengough* or person respectively, for a term of ninety-nine years if the same Son or Person respectively should so long live, and the terms of one hundred and twenty years and twenty years, or either of them, should so long continue, every elder of the same Sons, and the Person who, for the time being, and from time to time, should answer, or, in case of the death of his Parent, if such death had taken place, would answer the description of Heir Male of his body, to be preferred before every younger of the same Sons and the person who for the time being should answer, or, in case of the death of his Parent, if such death had taken place, would answer the description of Heir Male of his body: (The Testator then made successive limitations, during the terms of one hundred and twenty years and twenty

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years, to his Nephew *James Bengough*, his great Nephews *Henry Ricketts*, the younger, and *Richard Ricketts*, the younger, his Niece *Ann Elizabeth Bengough*, and his great Niece *Ann Ricketts*, the younger, respectively, and to their respective first and other subsequent born Sons, and to the persons who, for the time being should be, or who, in case of the death of their respective Parents, would be Heirs Male of such Sons respectively, similar to the Limitations before stated to have been made to *George* and *Henry Bengough*, and to their first and other subsequent born Sons, and to the Person who for the time being should be, or who, in case of the death of his Parent, would be Heir Male of the body of the same Sons respectively, except that he directed that the Estates of *Henry Ricketts* the younger, and *Richard Ricketts* the younger, and of their respective Sons, and of the Persons or Person answering the description of Heirs Male or Heir Male of their respective bodies should cease, if he or they, for the time being, should refuse to take the Surname and bear the Arms of *Bengough* only, after he or they should respectively become entitled to the receipt of the Income of the Trust Estates, and that the Estates of *Ann Elizabeth Bengough*, and *Ann Ricketts* the younger, and of their respective Husbands, and of the first and other Sons, and of the Persons answering the description of Heirs Male of their respective bodies, should respectively cease, if he or they, for the time being, should refuse to take the Surname and bear the Arms of *Bengough* only, after he or they respectively should become entitled to the receipt of the Income of the Trust Estates:) And, after the determination of the respective Estates and Interests of the first and other subsequent born Sons of the said *Ann Ricketts*, the younger, and of

the person who, for the time being, should be, or who, in case of the death of his parent, would be Heir Male of the body of the same Sons respectively, then in Trust for the person or persons respectively who, for the time being, and, from time to time, should answer the description of the Testator's Heir, or right Heirs-at-Law, and, if there should be more than one, in the same shares as they would be entitled to a Real Estate descending from him as the first purchaser thereof, and vesting in him or them as his right Heirs, to hold to the same person or persons respectively, and, if more than one, as tenants in common, as to each of the same persons, respectively, for a term of ninety-nine years, if the same person should so long live, and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue: And he directed that each of the terms of ninety-nine years should commence and be computed from the time when the person or persons respectively to whom the same terms were limited, should become entitled to the income of any part of his Trust Estates under the Limitations or Trusts therein contained; and that, in case the limitations or Trusts thereinbefore contained to or in favour of persons unborn, could not take effect precisely in the order in which they were directed to take place, and there should, consequently, be any suspension of the beneficial ownership by reason that the persons entitled to take under the same limitations or trusts should not be then born, then the income of his said devised Trust Estates should, during such suspension of ownership, belong to the person or persons for the time being entitled, or who, in case there had not been such suspension of ownership, would, for the time being, and from time to time, have been entitled to the next

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Estate in remainder, subject nevertheless to the right of any person or persons to be afterwards born, and who would have been entitled under any prior limitation or Trust, to have receive and take the income of his Trust Estates, from his, her, or their actual birth or respective births.

And he directed that, after the determination of the terms of one hundred and twenty years and twenty years, his Trust Estates should be settled, conveyed and assured, by his then Trustee or Trustees thereof, to and upon such person or persons, as would, at that time, be entitled to the same, either by purchase or descent, for the first or immediate Estate or Estates for life, in tail, or in fee therein, if the same Trust Estates had been, by his will, devised, settled or assured, to the use of his nephew *George Bengough*, and his Assigns, for his life, with remainder to his first and other Sons, successively, according to the priority of their births, in Tail Male, with remainder to his nephew *Henry Bengough*, and his Assigns, for his life, with remainder to his first and other sons successively, according to the priority of their births, in Tail Male, with similar remainders in succession to his nephew *James Bengough*, his great nephew *Henry Ricketts* the younger, his great nephew *Richard Ricketts*, the younger, his Niece *Ann Elizabeth Bengough*, his great Niece, *Ann Ricketts*, the younger, and their Sons, respectively, with a proviso for the Cesser of the Estate of *Henry Ricketts* the younger, and *Richard Ricketts* the younger, and their respective first and other Sons, and the Heirs Male of their respective bodies, who for the time should refuse to take the surname and bear the arms of *Bengough* only, after he or they should respectively become entitled to the receipt

of the said income, and also for the Cesser of the Estate of *Ann Elizabeth Bengough* and *Ann Ricketts*, the younger, and their respective Husbands, and the first and other Sons of their respective bodies, who, for the time being should refuse to take the surname and bear the arms of *Bengough* only, after he or they respectively should become entitled to the receipt of the said income, with reversion to his own right heirs: And he further directed that the person or persons to whom such Conveyances should be made should have such Estate in the Trust Estates as he or they would, at that time, be entitled to take under the said limitations, if the same Limitations were actually made by his will, and with the same or like remainders over as if the Trust Estates had been devised by his will, in manner aforesaid, or as near thereto as might be, and the circumstances of the case and the rules of Law and Equity would permit, yet nevertheless that no such person should have or be entitled to a vested Estate, or any other than a contingent Interest, until the expiration or sooner determination of the terms of one hundred and twenty years and twenty years: And he declared that such Limitations were introduced into his will only for the purpose of ascertaining the objects to whom such Conveyances should be made, and not for the purpose of making any immediate devise or gift to, or raising any immediate or present Estate, by way of Trust or otherwise, for them; on the contrary thereof, he directed that, during the terms of one hundred and twenty years and twenty years no person or persons should be entitled, at Law or in Equity, to any beneficial Estate in his Trust Estates, or the income thereof, by way of vested interest, for any longer period than ninety-nine years, determinable as before mentioned; and that, in the events and in the mode thereinbefore expressed, Heirs

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or Heirs of the body should be entitled to take, in the first instance, and as purchasers in their own right. And he directed that if, at any time during the terms of one hundred and twenty years and twenty years, each or either of the Male Persons who, for the time being, should be entitled to the Income of his Trust Estates, should require the same, it should be lawful for his Trustees to convey and assure to such Person the Trust Estates, or such one of the same, or Part or Share thereof, as he should be entitled to under the Trusts or Limitations thereinbefore contained, for an Estate of Freehold, for the life of the same person, so as to give him or her an Estate of Freehold, instead of an Estate for ninety-nine years: and he empowered his Trustees, during the terms of one hundred and twenty years and twenty years, with the consent of the persons who, for the time being, should be entitled to the Rents of his Trust Estates, under the limitations therein contained in Trust for them respectively, to lease his Trust Estates for fourteen years: and he empowered his Nephews and great Nephews, and their descendants, when they should be entitled to the Income of his Trust Estates, to jointure their wives out of the Trust Estates, to the extent of 400*l.* a year: and he authorized his Trustees, with the consent of the persons who, for the time being, should be entitled to the Rents of his said Trust Estates under the limitations of his Will, to sell or exchange the Trust Estates; and he also empowered them to repair his Trust Estates, and to cut Timber therefrom, and to employ Stewards Bailiffs and Managers for the same: And he directed that, if any contract for the purchase of any Hereditaments which he had entered into, should not be completed at his death, they should be completed by his

Trustees, and that the Purchase-monies should be paid out of his Personal Estate, and that the Conveyances should be made to them, their Heirs and Assigns upon the same Trusts as were declared concerning the real Estates before devised to them.

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And he gave all his printed Books and Manuscripts of every description to his Trustees, in Trust to permit them to remain in the possession of his Wife, during her life; and, at her decease, he directed that they should from time to time be considered Heir Looms, to be kept at Penn Park House, and be held and enjoyed by the person or persons for the time being entitled, under the Devises or Limitations therein contained, to his Paternal Estates in the parishes of *Pembroke* and *Kimbolton*.

And the Testator, after giving several Legacies, many of which he directed should not be payable until after the death of his Widow, and also some Annuities, gave to his Trustees, their Executors and Administrators, all the rest, residue and remainder of his Stocks, Funds, Monies, Mortgages and Securities for Money, and all other his Goods, Chattels and Personal Estate and Effects whatsoever and wheresoever, subject to the payment of his just Debts and Funeral and Testamentary Expenses and the several Legacies and Bequests by him, in and by his Will given and bequeathed as aforesaid, upon Trust that they should either continue his Monies upon the Securities upon which the same should be invested at his decease, or call in the same, and sell all such parts of his residuary Estate and Effects as should not consist of Money or Securities for Money: And he directed that, during the term of twenty-one years, to be computed from the day of his decease, the Trustees

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for the time being of his Will should receive the Dividends, Interest and annual Income of all his residuary Estate and Effects, and, from time to time during such term of twenty-one years, place, lay out and invest all such Dividends, Interest and Income, and the accumulations of the same, in the names of the Trustees for the time being of his Will, either in the Three per cent Consolidated Bank Annuities, or upon mortgages of Freehold Hereditaments in *Great Britain*, of a clear and indefeasible Estate of Inheritance in Fee-simple, as they should think proper, as an accumulating Fund, in order to increase the principal of his residuary Estate and Effects during such term of Twenty-one Years, and should with all convenient speed, from time to time during that term, lay out and invest all his residuary Estate and Effects, and all accumulations thereof, in Purchases of Freehold Hereditaments of an Estate of Inheritance in Fee-simple, in *England* or *Wales*, when eligible Purchases should arise, which Estates so to be purchased should be conveyed, unto and to the use of the Trustees, in Fee, upon the same Trusts, Estates, Uses, Intents and Purposes, and under and subject to such and the same and the like Powers, Provisoes, Charges, Conditions, Restrictions and Limitations, as were by him thereinbefore declared concerning his said Estates by him thereinbefore devised to them in Trust as thereinbefore mentioned, or as near thereto as the deaths of Parties, the change of Interests, and other circumstances and contingences, would admit; and appointed his Trustees to be Executors of his Will.

The Testator died on the 10th of April 1818, leaving *George Bengough* his Heir-at-law, and *Henry Bengough*,

James Bengough, Henry Ricketts the younger, Richard Ricketts the younger, Ann Elizabeth Bengough, and Ann Ricketts the younger, and also his Widow, and his Trustees and Executors surviving him.

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The Plaintiff and his Brothers and Sister, and *Ann Ricketts*, Widow, the Testator's Sister, were his only next of Kin at the time of his death. Shortly after the death of the Testator, *Charles Lucas Edridge, Arthur Palmer, and Charles Cadell Edridge*, proved the Will; but *George Wright* renounced the Probate of it, and executed a Deed of Disclaimer, as to the real Estates, to the other Trustees.

On the 10th of June 1821 Mrs. *Bengough* died. The Bill was filed by the Testator's Nephew, *George Bengough*, (who had no Son born), against the acting Trustees and Executors, and also against *Henry* and *James Bengough, Henry and Richard Ricketts, Ann Elizabeth Bengough, and Ann Ricketts*, none of whom had a Son, and certain Persons named *Cadell* and *Lunell*, who were the Personal Representatives of *Ann Ricketts*, the Testator's Sister, who died in 1819; and, after setting forth the Will and other circumstances before mentioned, it stated that, under the Will, the Plaintiff was entitled (if all the Trusts thereof were valid) to the real Estates devised by the Testator upon the Trusts aforesaid, for a term of Ninety-nine years, (if the Plaintiff should so long live), to commence from the death of the Testator, but subject to the Trust for the Trustees to receive the rents and profits thereof, for the term of Twenty-one years, to be laid out as in the Will was mentioned; and that the Plaintiff was also entitled, for the residue of a like term, to the Freehold Estates of *Inheritance*

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to be purchased with the Testator's residuary Personal Property, and with the accumulations thereof, subject to the Trusts for the Trustees to receive the rents and profits of the Freehold Estates of Inheritance so purchased, for Twenty-one years, to be laid out in the Purchase of other Freehold Estates of Inheritance, to be settled to the same uses as the Estates devised by the Will; and that the Trustees ought, during the term of Twenty-one years from the death of the Testator, to lay out the Rents and Profits of the Estates so devised to them in Trust as aforesaid, in the purchase of Freehold Estates of Inheritance in *England* or *Wales*, as often as they should have received the sum of 1,500*l.* from such Rents and Profits, after payment of the Annuities to the Plaintiff and *Henry Bengough*, which were charged upon the devised Estates, in case those Annuities should become payable during the term of Twenty-one years, and that the Plaintiff was entitled, under the Will, for a term of Ninety-nine years, if he should so long live, to be computed from the death of the Testator, to the immediate possession and enjoyment of the Freehold Estates so to be purchased with the Monies arising from the Rents and Profits of the devised Estates, and, in case the Rents and Profits of the devised Estates should not be laid out when they should amount to 1,500*l.*, that the Plaintiff was entitled to the Interest and Dividends of such sum of 1,500*l.* from the time the said Rents and Profits amounted to such sum until the same should be laid out in the purchase of Freehold Estates as aforesaid: but, if the limitations subsequent to the Life-Estates to the Plaintiff and his first Son were void, the Plaintiff was entitled, subject to those Estates and the Trust for accumulation, as a resulting Trust to the

Testator's Heir-at-Law, to his Real Estates, and to the Estates to be purchased with his residuary Personal Estate, or to a share thereof, as one of the next of Kin. And the Bill charged that there was no direction in the Will for the accumulation of the Rents and Profits of the Freehold Estates to be purchased, or that the Trustees should receive such Rents and Profits, but that the Testator intended to give to the Plaintiff the immediate enjoyment of the Freehold Estates so to be purchased, with the Rents and Profits of the devised Estates; and that, under the Will, the Plaintiff was entitled to have the whole of the Rents and Profits of the devised Estates which accrued during the life-time of Mrs. *Bengough*, subject to the payment of the annuity of 4,000*l.*, and, after her death, the residue of such Rents and Profits, after payment of the Annuities of 300*l.* and 200*l.* to the Plaintiff and *Henry Bengough*, applied, as often as the same should amount to 1,500*l.*, during the term of twenty-one years from the death of the Testator, in the purchase of Freehold Estates of Inheritance, and to be let into the possession and the enjoyment of such Estates as soon as the same were purchased, for a term of ninety-nine years, if he should so long live, to be computed from the Testator's death, and that, in case those Rents and Profits should not, immediately as they amounted to 1,500*l.*, be laid out in such Purchases, that the Plaintiff was entitled to receive the Interest and Dividends arising from such sum of 1,500*l.*, until the same should be so laid out. The Bill prayed that the Will might be declared to be well proved, and that the Trusts thereof, so far as the same were good in Law, might be decreed to be carried into execution; and that an account might be taken of the Per-

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sonal Estate and Effects of the Testator, and of his Funeral and Testamentary Expenses, and Debts, and Legacies and Annuities: and that the clear Residue of the Personal Estate might be applied upon the Trusts of the Will, so far as the same were effectual in Law; and, as far as the same were ineffectual in Law, then to such Person or Persons as would, in such case, by Law be entitled thereto: and that an Account might be taken of the Testator's Real Estates, and of the Rents received by the Trustees; and that what should be found due from them on taking that Account might be applied upon the Trusts of the Will, as far as the same were good in Law; and that the Court would be pleased to declare how far the Trusts of the Real and Personal Estate were good; and, as far as the Trusts were declared to be void, that the Plaintiff might be declared to be entitled to the Real Estate: but, in case the Trusts of the Will should be considered valid, then that such of the Rents and Profits of the Estates devised to the Trustees in possession as accrued during the life of Mrs. Bengough, might be applied in the Purchase of Freehold Estates of Inheritance in *England* or *Wales*, and that the Annuities of the Plaintiff and *Henry Bengough* might be paid out of the Rents and Profits that had accrued and should accrue after her death; and that the residue thereof might, during the remainder of the term of twenty-one years, be also applied in the purchase of Freehold Estates of Inheritance in *England* or *Wales*, and that such Estates, when purchased, might be conveyed to the Trustees upon the Trusts declared of the Estates so to be purchased; and that, as often as there should be the sum of 1,500*l.* arising from the Rents and Profits of the devised Estates, it might be laid out in such Purchases of Freehold Estates.

as aforesaid, and that the Plaintiff might be declared to be entitled to the immediate possession and enjoyment of the said Estates so to be purchased, for the term of ninety-nine years, if the Plaintiff should so long live, such term to commence or be computed from the death of the Testator, and that, in case the said Rents and Profits should not, as soon as they amounted to 1,500*l.*, be so laid out, the Plaintiff might be declared entitled to the Interest and Dividends thereof from the time the same amounted to 1,500*l.* until the same should be laid out in the Purchase of Freehold Estates; or that, in case the same Trusts were partly valid and partly invalid, then that proper directions might be given for effectuating such of the Trusts as were valid, and for declaring and effectuating the rights of the persons entitled, so far as the Trusts were invalid.

One question in this cause was, whether the Trusts of the Will were not void for remoteness. The other question was, whether the word, "thereinafter" in the Accumulation clause, was not to be construed "therein."

Mr. *Piggott*, for the Plaintiff, opened the Pleadings; and, it having been arranged that the Counsel for the Trustees should first address the Court;

Mr. *Preston*, for two of the Trustees, spoke in substance as follows:—

On the introduction of the various modifications of Estates made through the medium of Uses and Trusts and by Executory Devise in Wills, it was held that the vesting of an Estate could not be suspended for a longer period than the Life of the Survivor of existing individuals.

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In the Case of *Lloyd v. Carew* (a), an objection was taken that the shifting use was suspended, not only for the period of Lives in being, but for one Year certain, after the Determination of those Lives ; but the Limitation was, by the House of Lords, decided to be valid. And if a Gift may be suspended for one Year, it may be suspended for two or three Years, and so on, progressively, through the whole series of Twenty-one Years. For where the Law is settled that, a period of one Year certain may be taken, it is impossible to graft into that doctrine the exception, on which the Argument on the other side must depend, namely, that the term of Twenty-one Years is to be taken with reference to the period of Minority.

The contest in this Case is whether the vesting can be suspended for Lives in being and Twenty-one Years, not with reference to Minority, but of positive time. In *Taylor v. Biddall* (b) (a Case in which the prior Cases were cited) it was admitted that it might be suspended for Twenty-one Years after Lives in being. In *Stephens v. Stephens* (c) there is the Opinion of the Judges, and amongst them was Lord *Hardwicke*, to the same effect : they certainly delivered their Judgment very cautiously upon the Case. The Question there was, whether the enjoyment might be suspended for Twenty-one Years beyond a Life in being. In *Long v. Blackall* (d), the principal Question was, whether two periods of gestation should be allowed. It was agreed that there might be one period of Gestation. In that Case two periods were allowed, one at the commence-

(a) Shower's P. C. 137. (c) Ca. Temp. Talb. 232.

(b) 2 Mod. 289. (d) 7 T. R. 100.

ment, the other at the end of the contingency. On that Case it has been sometimes observed that it was very slovenly argued, and not very solemnly decided. But, from the Opinion delivered by Mr. Justice *Buller* in *Thellusson v. Woodford* (e), it appears that the Law is free from that reproach: Lord *Kenyon* presided; and in *Woodford v. Thellusson*, Mr. Justice *Buller* gave that Case the sanction and support of his concurrence.

Then there are the Cases of *Goodman v. Goodright* (f), and *Goodtitle v. Wood* (g); in the former of which *Willes*, C. J. observed: "The Rule has, in many instances, been extended to Twenty-one years after the death of the Person in being, as, in that case likewise, there is no danger of Perpetuity." In *Heath v. Heath* (h) the Devise was to the Testator's Son *E. H.* for ever, if he should have a Son or Sons who should attain Twenty-one; but, if *E. H.* should chance to die without Son or Sons to inherit, that the Son of the Testator's Son *W. H.* should inherit. So that there was not any Gift, to *E. H.* or to the second Son, with reference to his own minority; but *E. H.* himself was to have the absolute Fee, only on the terms that he should have a Son who should attain Twenty-one. It appears from the Wills and Settlements prepared and settled by Mr. *Booth*, Mr. *Fearne*, and other eminent Conveyancers, that they never doubted that the Twenty-one years after Lives in being might be taken as an absolute Term, independently of minority, and such a Limitation is, in every day's practice, inserted in creating Powers of Sale to be exercised in defeasance of Estates in Fee, and sometimes of Limitations in strict Settlement.

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• (e) 4 Ves. 227; see page 323. (g) *Willes*, 211.

(f) 2 Burr. 873. (h) 1 Bro. C. C. 147.

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In the argument of the Case of *Thellusson v. Woodford* (i), in the Court of Chancery, the Objection was in substance the same as is now made in this Case, namely, that the Party had been guilty of a breach of the rule against Perpetuities; because he had taken a certain number of Lives in being as the measure of time, not for the purpose of giving, but of suspending the enjoyment of the Property. The Judges, in that Case, certified their opinions that the Law permitted such a mode of Limitation; and that opinion was confirmed by the House of Lords. But an expression is reported to have fallen from Lord *Alvanley* in that Case, which probably will be relied on by my Opponents; I mean that passage in the Report where his Lordship says (k) that the term of Twenty-one years has never been considered as a period which may, at all events, be added to an Executory Devise after Lives in being; but that the term had been adopted with a view to the period of minority. But surely there must be something more strong than such a mere *dictum* to induce the Court to decide that the term of twenty-one years cannot be allowed after Lives in being, except where it is used with reference to the period, and for purposes connected with Minority. Such a *dictum* cannot guide the opinion of the Court, where other *dicta* and other decisions contradict it; and where all the great Text-writers, *Fearne*, *Blackstone*, and *Wooddeson* lay down the rule without any reference to the period of minority as necessary to give effect to the Limitation over (l). Besides all these Authorities the Act of Parliament of 39 and 40 Geo. 3, c. 98, is a Legislative Declaration to the same effect. But the case of *Beard*

(i) 4 Ves. 227.

(k) 4 Ves. 337.

(l) See *Fearne's Cont. Rem.* 429, 438; 2 *Black. Com.* 174; 2 *Woodd.* 229.

v. *Westcott* (m) may perhaps be relied on by the other side.—In that case the Judges of the Court of Common Pleas, to whom the Case was first sent, returned a certificate in favour of the validity of the Gift. But some doubt arose in the mind of the then *Master of the Rolls*, by reason of the expression in Lord *Alvanley*'s opinion, already stated, that the term of twenty-one years must be with reference to Minority; the question was therefore distinctly brought before the Court upon that point. On the second Argument the Judges certified that they were of opinion that the Gift would be good, although the term of twenty-one years had reference, not to the Minority of the Donee, but of another person. It is surprising that any doubt was ever entertained on that point, as the decision of Lord *Thurlow* in *Heath v. Heath* (n) is an express Authority, and settled the doctrine. But it is worth while to notice who were the Judges in the Court of Common Pleas who certified in the Case of *Beard v. Westcott*. They were Sir *James Mansfield*, (who was Counsel in the first Argument of *Thellusson v. Woodford*, and was afterwards on the Bench, and delivered, not merely his opinion, but his reasons in detail in that Case) and Mr. Justice *Heath*, Mr. Justice *Lawrence*, and Mr. Justice *Chambre*, who sat as Judges in the House of Lords when *Thellusson v. Woodford* was decided there. The *Master of the Rolls*, on being pressed with the importance of the question, was persuaded to send the Case of *Beard v. Westcott* to the King's Bench: and the Judges of that Court certified that the Gift was void. To understand the grounds of their certificate in that Case it is necessary

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(m) 5 *Taunt.* 393; 5 *B. & A.* 801; 1 *Turn.* 25.

(n) 1 *Bro. C. C.* 147.

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to consider the principle of the Law applicable to Perpetuities. The rule is that, if one Limitation is too remote, every subsequent Limitation must also be too remote, and for that reason void. In *Beard v. Westcott* the party attempted to introduce in the alternative (if the expression may be used) another Gift after one which was too remote; and the language of the Judges is adapted to that state of the Case, and applies, in some degree, to the Case of *Lord Deerhurst v. the Duke of St. Albans* (o), which was decided in this Court, as to the Limitation of Heir-looms, and to *Humberston v. Humberston* (p). The Decision of the Court of King's Bench in *Beard v. Westcott* is reconcilable with the rules of Law, because it proceeded upon the ground, that a Gift made by way of substitution for one which is too remote, is as bad as that for which it is attempted to be substituted. That is the whole result of the Certificate, and of the Decision in *Beard v. Westcott*. It is of great importance to refer to the observations of Lord Chief Baron *Macdonald* and of Lord *Eldon*, in the Case of *Thellusson v. Woodford*, on the Appeal, (q) as to the number of Lives. Nothing can be more clear than that there is no restriction as to the number of Lives in being during which the accumulation may take place, or the vesting of the Inheritance or of the Freehold be suspended. That being settled, and the Statute 39 and 40 Geo. 3, c. 98, having enacted that the accumulation may also be for a period of twenty-one years certain from the death of the Testator, it is impossible for any Court, acting on the Law as it now stands, to hold that a Gift is too remote which does not exceed these prescribed limits of Lives and twenty-one years.

(o) 5 Madd. 232. (p) 1 P. W. 332. (q) 11 Ves. 112.

It is to be observed that, by this Will, the legal Estate as to the Realty, (and for this purpose the Argument is the same as to the Personality), is vested in Trustees in Fee-simple, and consequently the whole Trust is under the dominion of the Court, and must be executed by it. The first Gift is upon Trust to accumulate for Twenty-one years; and that Gift is supportable under the Statute 39 & 40 Geo. 3, c. 98. It is impossible to resist the validity of that Trust: for, if the Law was not so before the Statute, by force and reason of the Statute it is so now; otherwise the Statute is, as to the right to accumulate for Twenty-one years from the death of the Testator, a dead letter. In the clause of the Will which relates to the accumulation for this period, there is a direction to lay out the Rents and Profits in the Purchase of Estates; and it unfortunately happens that there is, by a clerical error, the insertion of the word, "hereinafter" instead of "hereinbefore." This clerical mistake raises another question in this case.

The next period is that which gives the enjoyment to those who are to be owners in the interval, till the conveyance is to be made to the parties entitled to call for a conveyance on the determination of the terms of one hundred and twenty years and twenty years, that is, when Estates of Freehold may first vest. The singularity of the Limitations is, that the Testator takes a term of one hundred and twenty years, determinable on the death of Lives in being, and twenty years beyond that period, for the purposes of regulating the enjoyment during those terms, and suspending the right to vested Estates of freehold or inheritance. The twenty years cannot be objectionable. That is decided in many cases; and, before the

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Statute of Geo. 3, he might have directed an accumulation for the whole term of one hundred and twenty years, if any one of any number of persons in existence should so long live. This limitation is, in effect, only for a certain number of Lives in being, and twenty years after. During the period of the suspension of the inheritance the right of enjoyment is not suspended: for every person who is successively brought within the scheme of the Gifts is to take for ninety-nine years, if he shall so long live, and if the terms of one hundred and twenty years and twenty years shall so long continue. That is the extreme boundary. The limitation for ninety-nine years if a life or lives shall so long last, is clearly within the rule against Perpetuities; and the terms of one hundred and twenty years and twenty years are noticed only to show that the right of enjoyment under these terms is independent of, and not affected by the suspension of the Inheritance. In the Case of *Mogg v. Mogg* (r) the Court was of opinion no Perpetuity existed as to Leaseholds for years determinable on Lives, even though there might be a renewal, and probably would be renewals under the Tenant right. The ground of that opinion was, that there could not be any Perpetuity, because the Estate was determinable with Lives in being. In *King v. Cotton* (s), the Court decided that a Gift over on a general failure of Issue was not void, inasmuch as the Estate of the Testator was confined to a term of years determinable on the deaths of Lives in being. In Mr. *Fearne's* Treatise (t), many instances of this sort are given, and he himself puts the instance of an Executory Devise for

(r) 1 Mer. 654. (s) 2 P. W. 674.
(t) Cont. Rem. 488.

Life to one *in esse*, to take effect on a dying without Issue; he treats it as good, because it must take place or fail during the Life in being. In *Oakes v. Chalfont* (*u*) that point was recognized as good Law. So in the present case, as each succeeding person is to take only for ninety-nine years if he shall so long live, there can not be any Perpetuity. It is impossible to object to the Limitation to the first taker, unless it be contended that the whole Trust is void. But there is at all events a clear Trust, which, even if void in its full extent, is of such a character that the Court must execute it so far as it is consistent with the rules of Law. The doctrine of *cy pres* must be applied to it. The Case of *Tregonwell v. Sydenham* (*x*) is a conclusive Authority on that point. In that Case the Testator created a term of sixty years, and directed an accumulation for the benefit of persons to be ascertainable at a future period, so that the Trust was void to a certain extent. The Court sustained the term which was limited, *in toto*, and took so much of the Trust as was valid, and executed it, as in *Pemberton's Case*; and as to that part of the Trust which was void on the ground of remoteness, and as tending to a Perpetuity, it was held that the Heir-at-law was entitled to the Residue of the Term by a resulting Trust. This case is an Authority to support the Limitations for Lives in being in the present Case, even if the more remote Gifts should not be supported; and even though (which is very unlikely) it could, consistently with the Law as it now stands, be established that the term of twenty years, in reference to the trust of that term and the mode of enjoyment, is too remote, the doctrine of

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cy pres must support the Limitation for the Lives in being. If it be objected that this Testator makes, not only the Father and the Son, but likewise the Grandson and the Great-grandson, all Tenants for Life in succession, and that these remote Gifts have, as in ordinary cases, a tendency to a perpetuity, the answer is that it is a fallacy to apply the Rule to the Gifts in this Case. The plan of the Will is different. The Gifts are only for existing Lives, named in the Will, and twenty years beyond the death of the Survivor: and it cannot be said, truly and consistently with attention to legal accuracy, that the Gift has reference to the Life of the first taker, or of any other person who may take to the most remote period of both terms. At the death of one first donee, the next taker is, by express terms, to come into the enjoyment, and is, unquestionably, by express terms, brought into the enjoyment for a period determinable, not only with his own Life, but (and this is most important to the decision,) a period determinable with the terms of years, and these terms must determine with Lives of persons in being, and twenty years. It will, probably, be admitted that there is not any objection to the Limitations so far as they relate to Lives in being, and that the objectionable part is the last term of twenty years. Even if that objection were admitted, it would affect the Trust only as to the term of twenty years, because the Trust, so far as it is good, must be executed. Granting, therefore, for the purposes of the Argument, that the term of twenty years was improperly added, and that the Limitations do, to that extent, contravene the Law against Perpetuities, and that the Gift of the Freehold and Inheritance is, by reason of the term, too long suspended, still the enjoyment of the intermediate takers is not, during the first term,

determinable with Lives, exposed to objection. Although the ulterior Gifts be void, the Will is so framed that the other parts of the Will may be good. The first part of the Will, which directs an accumulation for twenty-one years, may be good, and also the second part, which gives the enjoyment to Lives in being, although the third or ulterior Gift of the Freehold and Inheritance may be wholly void as against the Heir-at-Law. On the other hand, if the Limitation for twenty years is also good, then the Inheritance is well given in Equity, because it might be well given at Law in the same form. And if the Inheritance be well given, then the Residue of the Personal Estate is also, for this purpose, well given. If, however, it should be held, that the Freehold and Inheritance are not well given, then unquestionably it must be conceded that the Heir-at-Law is, at the Testator's death, entitled to the benefit of the Gift which fails. It will be contended that, although the Gift, as to the Personality, should fail, still there is nothing to impeach the validity of the Trust, which directs the Personality to be laid out in the Purchase of Real Estate. It is understood that the parties who attempt to impeach the Limitations in this Will mean, on the Authority of *Tregonwell v. Sydenham*, already cited, to contend that, although the Gift of the Personality should fail, there is a sufficient indication of the intention of the Testator to purchase real Estates with the Personality, so as to give his Heir-at-law the benefit of that direction and of that Trust. Nothing of this sort was decided in *Tregonwell v. Sydenham*, or in any other case in which a Trust has been created for the benefit of other Persons, and ultimately, perhaps, for the Heir-at-law, but not in his character of Heir. The Gift here is to each of the Persons, mentioned in the pre-

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ceding clause, for ninety-nine years, if he should so long live and the terms of one hundred and twenty years, and twenty years, or either of them, should so long continue. It next prescribes the mode of enjoyment, and it is to be, in succession, to each Person for ninety-nine years, if he should so long live, determinable with the terms; and, after the determination of the respective Estates of the first and other sons of *George Bengough*, and of the Persons who for the time being shall be, or who, in case of the death of his Parent, would be Heir-male of the body, there is finally a Trust for the Persons who may be Heirs-at-Law. But this last Trust is not to the Heirs as Heirs. The Testator gives nothing to the Heir *quasi* Heir, as Heir and claiming by descent, but uses the word as *descriptio personæ*. The Testator having directed the mode of enjoyment during the period of the Terms and the Suspension of the Gift of the Inheritance, next directs the mode in which the Inheritance shall be conveyed. He prescribes that, from and after the expiration or other sooner determination of the term of one hundred and twenty years, the Trust Estates should be settled, conveyed and assured by the then Trustees to and upon such Person or Persons as would, at that time, be entitled to the same, in case they had been devised in a stated manner, *viz.* in strict Settlement. The period at which this Conveyance is to be made, and when the Suspension of the Inheritance is to end, is, by this arrangement, brought within the limits of the rule prescribed by Law against Perpetuities: for it is to be at the end of one hundred and twenty years from the death of the Testator, determinable with Lives in being, and twenty years (not the full term of Twenty-one years, which might have

been taken) beyond that period. In effect, on the death of the Survivor of several Lives, and twenty years from the death of the Survivor. If it be objected as to the term of twenty years, that there cannot be any absolute term beyond the Lives in being, unless with reference to Minority, how can such a proposition be reconciled with the case of *Lloyd v. Carew* (y), which allowed the validity of a Limitation after Lives in being and a term of one year certain, not having any reference to Minority? And if a term for one year certain can be taken without reference to Minority, a Limitation over must, consistently with the Rule against Perpetuities, be good, unless the term exceeds twenty-one years. The leading object of this Testator in framing this Will was to bring it within the Rule against Perpetuities, and to prevent the vesting of any Estates of Freehold or Inheritance, within these limits, in any of the Parties to whom Gifts are made. A vesting in the mean time would have defeated his great purpose. Many Clauses and Declarations were introduced with the view of expressing that intention, and excluding all inference and construction to the contrary. Until the period shall arrive when the Conveyance is directed to be made, it is impossible to ascertain the precise Person who shall answer the description which the Testator gives of him to whom that Conveyance is to be made. If the Limitations had not been so framed, it might have happened that his intentions might have been defeated by a Fine with Proclamations.

To leave no doubt as to his intention, the Testator has introduced several ancillary Clauses; and he de-

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clares that the Limitations used in describing the Person to whom the Conveyance is ultimately to be made, are used, merely and simply, for the purpose of ascertaining the Person, and not for the purpose of making any immediate Devise or Gift to them, or raising any immediate Estate in the Freehold and on the Inheritance, by way of Trust or otherwise, and that Heirs, or Heirs of the body, are to take as Purchasers. This was done to avoid the operation of the Rule in *Shelley's Case*. The power given to the Trustees to convey, to each person in succession who is to have an Estate for ninety-nine years if he shall so long live, an Estate for Life, was inserted for the purpose of enabling them to give to such persons a qualification to sit in Parliament, or exercise those other privileges which belong only to persons in whom an Estate of Freehold is vested. The clause as to the Personal Estate is in conformity with the other clauses, which direct Purchases to be made of Real Estates out of the accumulated Rents and Profits.

On the whole, therefore, this Will must be construed without regard to the providence or improvidence of such complex Limitations. It must be construed according to the rules of Law, as they now stand. The proposition on which the Will mainly depends is, the rule of Law that any man may, in the most express terms, limit his Property so as to suspend the vesting of it for any number of Lives in being and twenty-one years after the determination of those Lives. That is the utmost limit; and no Gift is too remote which does not transgress that boundary. To say that the rule is that the Suspension can only be during Lives in being and a period of Minority, is not recognized by any Authority, and is in direct opposition to the Decision of the House of Lords in *Lloyd v. Carew*, and in

direct opposition to the certificate of the Judges of the Court of Common Pleas in *Beard v. Westcott*, and also (it may be safely said) to the certificate of the Judges of King's Bench in that case. With respect to Gestation, some argument may, perhaps, be raised: it may be said, if a period is allowed for Gestation, with reference to Birth, why is not the period of Twenty-one Years to have reference to Minority? The two cases are perfectly distinct. Gestation has reference to a person who is *in esse*; for it is now settled that, for all purposes of benefit, a Child in the Womb is a person *in esse*, and can, as such, take by description.

To sum up these observations:—In the first place, the Gift for accumulation during a period of twenty-one years is good, as, independently of the Common Law, founded on and governed by the Statute 39 & 40 Geo. 3, c. 98.

Secondly, The Gifts for enjoyment during the period of Suspension of the Freehold and Inheritance are good, because they are all confined to ninety-nine years, if the Parties respectively shall so long live, and if the terms of one hundred and twenty years and twenty years shall so long continue.

Thirdly, The Gift of the Freehold and Inheritance of the Estate, to take effect on the determination of the terms of one hundred and twenty years and twenty years, is not too remote; because the first of these terms is determinable with Lives in being at the death of the Testator; so that the whole period of Suspension is only for a certain number of Lives in being, and twenty years after the death of the Survivor;

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and therefore within the limit which the Law has by its rules prescribed against the inconvenience of Perpetuities.

Mr. *Wilbraham*, for the same Trustees :—

The Law allows the Inheritance to be suspended without inquiring as to the purpose, or requiring that it should have any reference to the Person who is ultimately intended to take the Estate. From the earliest period, Estates have been allowed to be limited, not for the Life which is to enjoy them, but *pour autre vie*. If, therefore, an Estate might be limited to a Person, without reference to the beneficial enjoyment, when the Law afterwards permitted Limitations to be extended to the term of twenty-one years after Lives in being, there is the same reason for allowing the twenty-one years to be taken without reference to the Person to enjoy the benefit. The term of twenty-one years obviously has reference to Minority, on account of the disability of the Object of the Gift. Now a Leasehold Estate may be rendered unalienable as long as a Freehold. But, in applying the principle to the case of Leaseholds, it entirely fails; because an Infant has the power of disposing of a Leasehold Estate, by Will, at the age of fourteen; nevertheless it never was disputed that a term of twenty-one years, to commence after Lives in being, might be created out of a Leasehold Estate. The very terms in which the Rule is constantly stated exclude the reference to Minority. For it is not said, “That the Gift must take effect within the period of a Life or Lives in being, and the period of Minority afterwards,” but “during a Life or Lives in being, and twenty-one years afterwards.” And it appears, from the 39th and 40th Geo. 3. c. 98, that

the Legislature considered the period of Minority and the term of twenty-one years as equivalent to each other. Next, as the terms of one hundred and twenty years and twenty years are confined to the period of which the Law prescribes, those terms are well created, and consequently, the Limitations which are to take effect on the determination of those terms are valid.

Mr. *Swann*, who appeared for the other Trustee, declined to offer any Argument to the Court.

Mr. *Sugden* and Mr. *Lynch* appeared for the personal Representative of Mrs. *Ricketts*, who was one of the Testator's next Kin :—

Mr. *Sugden*.—The Limitations in this Case are clearly beyond the Limits which the Law allows. On the other side it is argued that the accumulation for the first period is good by the Statute. Then it is said that the terms for one hundred and twenty years and twenty years are good; and, therefore, that all the Limitations to take effect within their duration are also good. Again, it is contended that the inheritance is suspended (which it is strange should be admitted, as it is an objection to all the Limitations,) and that, at the determination of the terms, the Inheritance is to become vested in some Person or other; but who that Person is to be, it is admitted that, at present, it is quite impossible to say. This is the greatest attempt at a Perpetuity that was ever made; greater than in *Thellusson's* Case. For it is admitted that eighty or ninety years hence, and not sooner, will be the time for discussing who the Person is in whom the Inheritance is to vest. The whole object of the Will is, clearly, to establish a Perpetuity. It is said on

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the other side, that the Limitations should be considered separately. But the proper course is, to consider whether the Limitations, all taken together, are not void as an attempt at a Perpetuity. It has been asserted that the 39th and 40th Geo. 3. c. 98, is a Legislative Declaration that the term of twenty-one years may be added as a positive term. But that is not the true construction of the Act. It is expressed in the alternative, and provides that no accumulation shall take place except for the Life of the Grantor, or the term of twenty-one years from his death, or during the Minority of any Person who shall be living, or *in ventre sa mere* at the time of the Grantor's death. It makes nothing lawful that was not so before. The object of the Legislature was to restrain the improper use made of the Rule that allowed accumulation to be co-extensive with the Suspension of the Limitations, and to confine it within the more limited period. But, if the construction now contended for be right, the Act would, in fact, allow accumulation for a longer period than was before permitted. It was decided, in *Marshall v. Holloway* (z), that you cannot have a general Clause of Accumulation during the Minority of every Person who may become entitled under the Settlement, but must confine it to some limited period allowed by law. In deciding this Case, Lord Eldon, C. followed the Case of *Lord Southampton v. the Marquis of Hertford* (a), in which it was held that it was impossible, in such a Case, to divide the Clause, and to hold the Will to be operative upon those Persons who were Minors and *in esse*, and therefore within the Rule of Law, from those who

(z) 2 Swan. 432.

(a) 2 V. & B. 54.

were without the Rule of Law, as being born at too remote a period, and that therefore the Clause was altogether void. It is clear therefore that this Will cannot derive any aid from this Act of Parliament.

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This Testator has, through the medium of the terms of one hundred and twenty years and twenty years, attempted to establish a Perpetuity: and that attempt, like every other of the same nature, must fail. The Limitations which are to take effect during the continuance of these terms would be instantly declared void in a Court of Law; and it is not in the power of a Court of Equity to give validity to any Limitations of the Equitable Interest which would not be good if they were Limitations of the Legal Estate. An Estate may certainly be limited to an unborn Son: but if there is one rule more solemnly settled than another, it is that you cannot limit a succession of Life Estates to an unborn Son, and the Sons of that unborn Son.

To try the validity of these Limitations let them be considered as Legal and not as Equitable Limitations. The first, which is the term of twenty-one years, created for the purpose of accumulation is allowed to be authorized by the Statute. Then comes the Gift to the Nephew *George* for ninety-nine years, if he should so long live, and if the terms of one hundred and twenty and twenty years should so long continue. So far it is good. After the death of the Nephew it is given to his first and other Sons for ninety-nine years, if the same two terms so long endure. This brings the Gift to unborn Sons, which is also good. But then there is a Gift to the unborn Sons and their issue, in succession, for ninety-

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nine years, if they so long live and the two terms shall so long last. There is a clear authority that such a Limitation is void, *Somerville v. Lethbridge* (b). That Case decided that Limitations to a Succession of unborn Sons, for ninety-nine years if they should so long live, are all void beyond the Limitation to the first unborn Son. If this Will therefore had been prepared without the insertion of those material words, and if the terms of one hundred and twenty years and twenty years shall so long continue, no Lawyer could have contended for a moment that the Limitations were not altogether void. Continuing then to consider these as Legal Limitations, after the twenty-eight lives drop and the term of twenty years, which is a term in gross, ends, at that remote period, the Person is to be ascertained who is to take the Inheritance as a Purchaser. And who is he to be? He is to be the Person who would have been entitled in case the Estate had been limited according to that course of Limitations which the Law allows. It is not, therefore, until that remote period that the Testator adopts the course of Limitations which the Law sanctions. If these had been Legal Limitations would they have been good? It is clear they would not. Is then the Law against Perpetuity to be evaded by such machinery as this? The Law has said that a Succession of Life Estates cannot be given to unborn Issue; and yet, if the Limitations of this Will are to be supported, there is a contrivance by which any Testator may easily evade the rule of Law. The reason why the Legal Estate in Fee-simple is, by this Will, vested in Trustees is, that it was felt that there was no chance of supporting the

Limitations if they have been made of the Legal Estate. The first step of the Testator towards evading the rule of Law is, to dispose of the Legal Fee; and then he makes the Equitable Interest the subject of his attempt at a perpetuity. But the rule, that Equity follows the Law, must defeat that attempt. The whole Fee-simple being vested in Trustees, the Limitations are still more objectionable than if they had been Legal Interests, because there is no division of the Inheritance. The Trustees have no particular Estate.

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The entire Equitable Interest is disposed of; and the Limitations of it must be subject to the same rules as the Limitations of the Legal Fee. This Testator, after vesting the Legal Fee in the Trustees, proceeds to dole out the Equitable Fee amongst his Family. He makes his Nephew, *George*, Tenant for ninety-nine years, if he should so long live; he gives similar interests to the eldest Son, Grandson, &c. of that Nephew, in succession; and, after the dropping of twenty-eight Lives, and the expiration of a term in gross of twenty years, computed from the death of the Survivor, he gives the Inheritance to the Person who would have taken it under the Common Limitations. Unless the mode of Limitation can alter the rule of Law, it is impossible that such a Will can be supported.

If these Limitations are clearly bad, it is impossible to make them effective by inserting Limitations for a term of one hundred and twenty years, if twenty-eight Persons, or any of them, shall so long live, and for a term of twenty years beyond that; because these latter Limitations have no apparent operation and exist nowhere but on paper. No such Limitations were

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ever before attempted ; and although it has been stated that there are in existence Drafts, prepared by Lawyers whose names cannot be mentioned without the greatest respect, which contain Limitations that are very remote, yet no instance can be produced of their having been actually used in practice.

As to the cases which have been cited as authorities for the validity of this Will, none of them go to the extent stated in the argument. And it is impossible to refer to the history of the Law on this subject without being surprised at the slow progress which it made ; for the *Duke of Norfolk's* Case is not of great antiquity ; and yet the whole question there was whether Limitations over, confined to Lives in being, were void. The case of *Lloyd v. Carew* (b) certainly goes further than any other that has been decided. But it is impossible to take it as an authority to support the Limitations in this Will. The Limitation over, in that case, was to take effect upon the failure of Issue living at the death of the Survivor of the Husband and Wife : and the period of twelve months was allowed, merely to give time for payment of the 4,000*l.*, which was a condition imposed on the object of the Limitation over. But the period when the Limitation over was to take effect, was the failure of the Issue of the Marriage upon the death of the Survivor, and not at the expiration of twelve months after that event.

It is clear that, if there was not a failure of Issue at the death of the Survivor, the Limitation over could

(b) Show. P. C. 137 ; S. C. Prec. Ch. 72.

never operate. And, even looking at this Case in the point of view most favourable to the Limitations in this Will, it authorizes the addition of twelve months only to Lives in being as the period within which the Limitation over must have effect; and those twelve months added for a specific and reasonable purpose. In the *Duke of Norfolk's Case*, Lord Nottingham said that he would stop wherever any inconvenience appeared: that is the true principle. In *Lloyd v. Carew* it was argued, on one side, that the Courts had never gone beyond Lives in being (as they certainly never had); and, on the other, that there was no inconvenience in allowing twelve months for payment of the Money. Yet the Court of Chancery, the Chancellor being assisted by the C. J. of the Common Pleas and another Judge, decided against the validity of the Limitation. It was, however, supported by the House of Lords. But no such proposition was advanced throughout the whole Case, not even in argument, as that a period of twenty-one years after Lives in being might have been interposed before the Limitation over. The Case of *Taylor v. Biddal* (c) turned merely upon Infancy. No Case that ever occurred excited more attention, or was more elaborately argued, than *Stephens v. Stephens* (d): and it has always been considered as one of the most leading Cases in the Law; yet it is plain that none of the Counsel or Judges, at that time, had any notion that a Limitation to take effect after Lives in being and a further term of twenty-one years as a term in gross, could be supported. The Certificate of the Judges contains the following sentence:—" However unwilling we may be to extend

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(c) 2 Mod. 289; 1 Eq. Ab. 188.

(d) Ca. Temp. Talb. 228; 2 Barnardist. 376.

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Executory Devises beyond the rules generally laid down by our predecessors, yet, upon the authority of that Judgment (*Taylor v. Biddal*) and its conformity to several late determinations in Cases of terms for years, and considering that the power of alienation will not be restrained longer than the Law would restrain it, *viz.* during the infancy of the first Taker, which cannot reasonably be said to extend to a Perpetuity; and that this construction will make the Testator's whole disposition take effect, which, otherwise, would be defeated, we are of opinion that the Devise before mentioned may be good by way of Executory Devise." In the Case of *Long v. Blackall* (e) there was no reason why the opinion of the Court of King's Bench should have been taken, if the rule was that a good Limitation could be made to take effect after Lives in being and a whole period of twenty-one years from the determination of the Lives; for the question there was as to the allowance of a few months for gestation. So in *Routledge v. Dorril* (f) there was an unlimited power given to a Parent to appoint to her Issue; and the Court was of opinion that an execution of the power would be void unless it were confined to Persons *in esse* at the death of the Parent. Neither in that case nor in any other was it thought possible to add a term of twenty-one years after Lives in being as the period within which a Limitation over could be made to take effect. In *Jee v. Audley* (g) the Bequest over to the Daughters of *John* and *Elizabeth Jee* was held to be too remote, as it extended to Daughters who might be born after the Testator's death. The Will in *Thellusson's Case* did nothing in comparison with what is attempted here.

(e) 7 T. R. 100. (f) 2 Ves. jun. 357. (g) 1 Cox. 324.

It merely directed an accumulation for nine Lives then extant, and the Estate is then to vest in possession. So that there is no term of twenty-one years, no time for gestation, and no terms of one hundred and twenty years and twenty years. If the limit allowed by Law is such as is contended for, *Thellusson's Case* would not have occupied three minutes in argument.

In the Case of *Crooke v. De Vandes* (h), the question 8th Mar. was upon the remoteness of a Limitation which was to take effect at the end of an absolute term of thirty years after the Testator's death; and the *Lord Chancellor* was of opinion that it was a void limitation, and he so decided.

I will now, in addition to the authorities, show to the Court what has been the opinion of all the Judges at the several times in which this question has been agitated. And I will undertake to show that, although there may be, in some of the books, a general statement, by a Judge in his Judgment, that the utmost term allowed is Lives in being and twenty-one years, yet that it can not be considered that he intended it to be taken as a term in gross; all that is meant is, that it is the utmost limit; but it is never said that that term must not be measured by something else.

The Law originally allowed Estates to be limited *pour autre vie*: and, as it considered an Estate to a man for his own life to be greater in value than an Estate to him for the lives of a thousand other persons, it allowed Limitations to be made for any number of Lives. But

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when you measure a Life against any other given number of Lives, not with reference to the value of the Estate in point of limitation and in point of Law, but in point of duration, it is absurd to say that a thousand Lives are not of more value than a single Life. The Law then having allowed of the creation of Estates for any number of existing Lives, it was afterwards converted to the purpose of a Limitation, without reference to the Lives which were to be the measure of enjoyment. But this could not be the case with respect to the term of twenty-one years: for that term, taken as a term in gross after Lives in being, has reference to nothing; there is nothing to which you can refer it, except the minority of the party. The rule laid down by every Judge who has spoken on the subject is, that an Estate may be rendered unalienable during Lives in being and twenty-one years and a few months, allowing for gestation. As then those few months are allowed for gestation, must not the twenty-one years be allowed for minority? Medical men are not agreed as to the exact period of gestation. Some of them allow even twelve months. So that if the additional months have no reference to gestation, the term may be extended to twenty-two years absolutely. For if the twenty-one years are not measured by minority, how can the additional months be measured by gestation? It would be absurd to say that that which flows from, or is ancillary to, the former term, is to be considered as having reference to gestation, but that the term itself is to be an absolute one, without reference to any event. It has been said that the term of twenty-one years could not have been chosen with reference to minority and the disability of alienation attendant upon it, because the same term has been fixed upon as to Leaseholds,

to which the reason does not apply ; as an infant may dispose of a Leasehold Estate at the age of fourteen. This, however, proves nothing : for though an infant may dispose of a Leasehold Estate by Will, he cannot by Contract. Besides the rule by which the same term was allowed, both with respect to Leaseholds and Freeholds, was founded in convenience : for Estates generally consist of both species of Property, which cannot be separated without great disadvantage ; and therefore the same rule was applied to one as to the other, although the same reason for it did not exist.

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I will now call the attention of the Court to what has been said, by successive Judges, on the question whether or not the term of twenty-one years can be taken as a term in gross : and Lord *Albany* is the only Judge who has expressed his opinion on this question explicitly (i). In *Thelluson v. Woodford* (k), *Macdonald*, C. B. in delivering the opinion of the Judges states the rule in this way : "With an easy interpretation, we find from Lord *Nottingham* what that tendency to a perpetuity is which the policy of the Law has considered as a public inconvenience, namely, where an executory devise would have the effect of making Lands unalienable beyond the time which is allowed in Legal Limitations, that is, beyond the time at which one in remainder would attain his age of twenty-one, if he were not born when the Limitations were executed." Then he says, in another passage : "I understand him to mean that, wherever Courts perceive that such would be the effect, whatever may be the mode attempted, that effect must be prevented ; and he gives the same,

(i) See 4 Ves. 337. (k) 1 New Rep. 386.

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but no greater latitude to Executory Devises, and to Executory Trusts, as to Estates Tail. This has ever since been adopted." And, in another part of the same Report, that learned Judge says: "The established length of time during which the vesting may be suspended is during a Life or Lives in being, the period of gestation, and the infancy of such posthumous child." It is quite clear, from these passages, that the Chief Baron considered the Rule to be that the twenty-one years could not be taken as a term in gross. The Counsel for the Trustees referred to the Case of *Long v. Blackall* (*l*), as containing the Judgment of Lord *Kenyon*, C. J. in support of their Argument. The whole of that Judgment, and especially the following passage, is directly in my favour: "It is an established rule that an Executory Devise is good if it must necessarily happen within a Life or Lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation." The Case that was next cited was *Keiley v. Fowler* (*m*). It appears, from the Judgment of *Wilmot*, C. J. in that Case, that it was the opinion of that learned Judge that the term of twenty-one years was allowed in the Case of Infancy only. The same doctrine is laid down in *Thellusson v. Woodford* (*n*), and in the reasons offered by the Counsel for the Crown in the same Case (*o*), particularly in the following passage: "Every Executory Devise is good that does not tend to make an Estate unalienable beyond the period allowed by Law as to legal Estates, which cannot be rendered unalienable beyond the time at which the remainder-man

(*l*) 7 T. R. 100.(*m*) Wilm. 306, 307.(*n*) 4 Ves. 260 & 264.(*o*) See i New Rep. 379.

who was not in existence at the time of the Limitation of the Estate would arrive at the age of twenty-one." There is an opinion of Mr. *Yorke*'s (p), who was very much concerned in all the Cases that arose on perpetuities, in which he states that, by way of executory devise or springing use, the Inheritance may be suspended from vesting during a Life or Lives in being, or during the infancy of the first unborn Tenant in Tail; but it can be suspended no longer. And, in the *Duke of Marlborough's Case* (q), we have the reasons for the rule assigned by Mr. *Yorke*, and they are thus expressed: "This arises from the policy of the Law against perpetuities, that the vesting of the Inheritance or Ownership may not be suspended beyond the compass of a Life or Lives in being, or beyond the age of twenty-one years of the first unborn Tenant in Tail, during whose Infancy, the Law itself will restrain his power of alienation."

When Lord *Alvanley*, M. R. came to give his opinion to the *Lord Chancellor*, in *Thellusson's Case*, it having appeared to him that Mr. *Justice Buller* had laid down the rule in a way that would authorize the taking of the term of twenty-one years as a term in gross (although on looking accurately at the whole of the learned Judge's argument, it will, I think, appear that he did not mean so to lay down the rule), his Lordship was so strongly impressed that the rule was otherwise, that, although it was not necessary to decide the point, he could not refrain from stating, in the following words, what his view of that point was (r): "As to

(p) 2 Ca. & Op. 440. (q) 3 Bro. P. C. 245; Tomlin's Edit.

(r) 4 Ves. 337.

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the period of twenty-one years (speaking of the learned Judge who decided *Long v. Blackall*) that could not be his meaning; nor, with submission to the learned Judge who immediately preceded me, has it ever been considered as a term that may, at all events, be added to such Executory Devise or Trust. I have only found this *dictum*, that Estates may be unalienable for Lives in being and twenty-one years, merely because a Life may be an Infant, or *en ventre sa mere*: therefore, I am clearly of opinion, that that expression cannot be held to mean more than Children in the womb at the Testator's death."

Then came the case of *Beard v. Westcott*, which was twice argued in the Court of Common Pleas. When the cause was brought on before the *Lord Chancellor*, upon the Judges' certificate, his Lordship, though not without reluctance, granted a case to the K. B. The Judges of that Court returned their certificate, and the *Lord Chancellor* confirmed it. (s). This decision was made at the close of all the authorities: it has not been appealed from, and cannot be shaken.

Some reference has been made to text-writers. Mr. *Fearne's* opinion has been referred to in support of these Limitations. After stating many of the Cases that have been cited in the course of this argument, he draws the rule thus: "The Limitations in the two last-cited Cases were confined to vest within a certain number of months after the end of a Life in being. But these are not the utmost limits allowed for Executory Devises; for the Courts have gone as far as to

(s) See 5 *Taunt.* 393; 5 *B. & A.* 801; and 1 *Turn. & Russ.* 25.

admit of Executory Devises limited to vest within the compass of twenty-one years after the period of a Life in being. That was admitted in the case of *Taylor v. Biddal* (s)." And then he cites those cases in which twenty-one years were admitted for the purpose of infancy. In no one passage of his book does he speak of the question; nor did it occur to his mind, as one that could be raised, whether the term might or not be a term in gross. That passage, therefore, cannot be considered as an authority upon the subject.

The Case next cited is *Heath v. Heath* (t). That Case has never been denied to be Law. But there the term of twenty-one years was not taken as a term in gross, but with reference to the Limitations of the Estate. A Fee is given, if the Devisee have Issue who survives him and lives to attain the age of twenty-one; and, in that case, that Issue, which is the first line of generation, will take a disposable Inheritance, and that Fee, which was given for the purpose of descent, will not go over, but remain in the Devisee so as to descend to his Issue. But if the Devisee have not a Son who lives to take a disposable right in the Inheritance descended from him, then it is to go over. And that is as clearly within the rule now contended for, as any Case which could be put. And, therefore, though so much relied on, it has not the slightest bearing on the case, as opposed to the view of it now submitted to the Court. If that be so, it may now be asserted that the rule is, that the term of twenty-one years cannot be taken as a term in gross; and, if it cannot, then, unquestionably, all these Limitations fall to the ground. For if

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they are void as to the twenty years, they are void as to the Lives in being. For, if there be any rule of Law more sacred than another, it is that a Limitation, which is in itself illegal in point of perpetuity, can not be controlled or corrected. At least it cannot be done here; as it is all one Limitation. For it is to Trustees for one hundred and twenty years, during twenty-eight lives, and for twenty years after the death of the Survivor. It is impossible to sever them. It is one Limitation, and not two. But suppose that the twenty years could be cut off, what would become of the Limitation over? For that Limitation is not upon the determination of any term of the former Limitation, but is to take effect when the one hundred and twenty years shall expire by the determination of the Lives; and the twenty years after shall end. Then when is the Limitation over to operate? At the end of the Lives? That is contrary to the Testator's direction. By the Law of the Country, no Judge has the power of saying that that which is not to arise till the end of certain lives and twenty years after, shall arise at the end of the lives, without waiting for the expiration of the twenty years. If the Limitations have gone too far, and cannot be sustained in point of Law, then, according to *Beard v. Westcott*, they are all void. Suppose, for the sake of argument, that the Court should be of opinion that the Limitation might be severed, and be held good for the one hundred and twenty years, and void for the twenty years, then the Case would be precisely similar to *Beard v. Westcott*. For the Testator has said that the Children of *George Bengough*, and their Issue, to the latest Generation, shall, during the existence of the lives and the absolute term of twenty years, take the Estate in the way he has

pointed out; and that the right of the Person to take, as a Purchaser, under the second set of Limitations, shall not arise until all the Lives shall have dropped, and the twenty years have expired. If then the twenty years are cut off, the consequence will be that there will be Persons who would be *in esse* and willing to take, if they could be allowed to do so by Law, during the remainder of that term of twenty years; but they cannot take during that term, because it is void; and yet the Gift over can not be accelerated, because the Testator has said that no Person shall take the Estates, as a Purchaser, until the expiration of that term.

Next, with respect to that Proviso in the Will which authorizes the Trustees to give the persons entitled to the Income of the Estates, an absolute Estate of Freehold for their Lives, instead of an Estate for ninety-nine years. This clause makes void, at once, all the Limitations. For it enables the Trustees to give Life Estates to the third generation of descendants. It is plain, therefore, that it was the intention of this Testator to evade the rule of Law, although his professed object is to keep within it. In former attempts at perpetuities, powers were given to the Trustees, as a tenant in tail came *in esse*, to restrict him to an Estate for Life, and to make his Sons purchasers. But those attempts invariably failed; and yet it never occurred to any one to confine the exercise of the power to a certain number of Lives and twenty-one years after. If the rule be as is contended for, a Testator may limit his Estate to Persons *in esse*, for their Lives, with remainders to their Issue in tail, and give a power to the Trustees to cut down the Estates Tail into Estates for Life during the Lives of all the Members of both Houses of Parliament

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and twenty-one years after the death of the surviving Member.

The objection to taking the twenty-one years as a term in gross is, that the person, who is to take at the expiration of the term, may be an infant, and thereby alienation be restrained for twenty-one years more, and the analogy between limiting Estates in strict Settlement and by executory Devise be destroyed. Whereas if the term be taken with reference to infancy, alienation cannot be restrained for a longer period than twenty-one years after the vesting of the Estate ; and the analogy is preserved. It is admitted that the Limitations of this Will, taken abstractedly, would be illegal. But it is said that, because they issue out of a limited interest, or are circumscribed within the terms of one hundred and twenty years and twenty years, they are valid. Although this is stated as an acknowledged rule of Law, and is the foundation of the arguments in favour of the Will, not even a *dictum* has been or can be produced to establish it. For Limitations are to be judged of, with reference to perpetuity, not by the quantity of the Interest out of which they are to issue, but by their Legal Effect ; and nothing could be more inconvenient than to hold the same Limitations good in one case and bad in another. The only Case that has been referred to as an authority upon this point is *King v. Cotton* (a). It is observable, in that Case, that the term never could exceed the Life of Lady Cotton, and, therefore, the Court might have put a different construction on the words "heirs of her body" from what they would have done if the term had been an

absolute one. But the Court came to no decision at all upon the validity of the Limitation. Suppose an Estate held for Lives were granted to *A.* and the Heirs of his body, and, for want of such Issue to *B.* and the Heirs of his body; could it be contended that the words "for want of such Issue" ought to be confined to a failure of Issue during the Lives, and that, therefore, *A.* did not take a *quasi* Estate Tail? No; but in strict analogy to the effect given to the same Limitation out of a fee-simple Estate, it would be held to give *A.* a *quasi* Estate Tail. So if a term of ninety-nine years determinable on the dropping of a Life, is granted to a Person and the Heirs of his Body, the grantee takes the entire Interest, for this reason, because the same Limitation out of an Estate in Fee-simple would have given an Estate Tail; and, therefore, the Law, as it does not allow of such an estate in a chattel, would give an Interest, as nearly as possible, to the same extent, for the sake of effectuating the intention. Consequently the Limitations out of these terms must be governed by precisely the same rules as Limitations out of a Fee-simple are; and therefore they are void. But suppose that, on account of the limited Interest out of which an Estate is to arise, a Testator may exceed the regular boundary of legal Limitation; still these Limitations would be void. For here there is no divided Estate, but the entire Fee-simple is absolutely vested in the Trustees.

It is now to be considered how the personal Estate is operated upon with reference to the real Estate. The personal Estate is directed to be invested in Land, which Land is to be settled to the same uses as the real Estate before devised. If then the Court should be of

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opinion that the Trusts which are created of that Estate are void, the necessary consequence is, that the Gift of the personal Estate would altogether fail; because the purposes to which the real Estate are to be applied, are purposes which are not allowed by Law; and, therefore, the Trust would be one not authorized by Law, and the next of Kin would become entitled to the Money. The Case, which has been referred to, of *Tregonwell v. Sydenham* (x), is distinguishable. The Court of Exchequer, when it came before them, were of opinion that the Trust upon which the Money was to be applied was void, as being too remote, and that the Devisees, who were Devisees of the Estate subject to the Trust-term, would take the Estate discharged from the Trusts. The House of Lords reversed that Decision, and held that, although the purposes for which the Term was created might be void in Law, and, therefore, could not be carried into execution, yet, as the Rents were severed from the real Estate, and directed to be absolutely raised and invested in real Estate, the Heir-at-Law was entitled to have those Rents raised and paid to him for his own benefit. It does not appear to have occurred, to the learned Persons who decided that Case, that the consequence of illegality on account of perpetuity is different, in almost every respect, from that of other invalid dispositions. If an Estate for Life is given with remainder over, and the Person to whom the Life Estate is given is incapable of taking it, the remainder is instantly accelerated. But if the particular Estate is void on account of perpetuity, there is no acceleration; and even that which otherwise would be a good remainder, altogether ceases and is void. It would, therefore, seem that there was great occasion to

suppose that the Decision of the Court of Exchequer was right. But, be that as it may, the distinction between that Case and the one now before the Court is, that this is a case of personal Estate to be applied in the purchase of real Estate, which is to be settled to uses which are void ; and, therefore, there is no object in making the investment. But, in that Case, the Rents were portions of the real Estate, and, the dispositions being void, the House of Lords decided that the Heir took that which was taken away from the Devisee, and not properly given to any body else. That Decision, therefore, has no bearing on the present Case. The consequence is that this, being personal Estate, must retain its character of personal Estate, and the purpose of investment, being such as is not allowed by Law, cannot take effect ; and the next of Kin are therefore entitled to it, as undisposed of.

Mr. Lynch :—The plan by which this Testator has endeavoured to effect the object which he had in view, is, in substance, that which has, on former occasions, been attempted, but which has always failed, that is, to give successive life Estates, or rather Estates for years determinable upon Lives, not only to Persons living at his decease, but to their Sons not then born, and to the Children of such Sons *ad infinitum*, declaring, at the same time, that each Person is to take as a Purchaser : And the first question is as to the validity of the Trusts declared of these two Terms of years ; and the next, as to the validity of the Terms themselves.

It is clear, from the Cases which have been cited, of *Somerville v. Lethbridge*; and *Beard v. Westcott*, that all the Limitations in this Case or Trusts declared

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subsequent to that to the first Son of the Plaintiff, are void; and, that being so, that the Terms, supposing them to be valid, cannot support Trusts in themselves illegal: and, on the other hand, that, if these Terms are invalid, the Trusts which depend on them must fail. It has, however, been urged that these Terms are valid, and are, therefore, capable of supporting Trusts in themselves invalid. But that cannot be: for you cannot effect by indirect means, that which cannot be done by direct means; and if these Terms are introduced into this Will for no other purpose than to evade the Law, they cannot be supported, and cannot support Trusts in themselves illegal. Terms for years are generally introduced into Wills and Marriage Settlements, for the purpose of raising Portions or Charges, or other sums of Money, in order to provide for the necessities of Families. The Terms for years are not introduced into this Will for any such purpose. The legal Estate is not conferred on Trustees, distinct from the Holders of the Inheritance, in order that they may raise a sum of Money to provide for the necessities of a Family. The whole legal fee simple is vested in the Trustees, and they are merely directed to stand possessed of a portion of the Inheritance for the Terms of one hundred and twenty years, and twenty years. But they have no duty to perform: and the only purpose for which those Terms are created, is to evade the Law.

If the Testator did not wish to confer the legal Estate on his Devisees, nothing could have been easier for him than, after giving the legal Estate in fee simple to the Trustees, to declare the Trusts. Those Trusts would have been for the Plaintiff, for ninety-nine years, if he should so long live, with Remainder to his Son, for

ninety-nine years, if he should so long live, with Remainder to his Heir Male for ninety-nine years, if he should so long live. But the framer of this Will knew well that such Trusts would be as void in Equity as a Limitation to the same effect would be void in Law: and therefore it was that he introduced into this Will what may fairly be called a contrivance to evade the Law. Suppose a legal Term of years had been created, and that the Trustees of it were to raise a sum of Money for the benefit of a Person at the age of thirty; such a Gift would be void according to the Case of *Crooke v. De Vandes*. It was not contended there, and could not be contended in the Case put, that the validity of the Term could support the validity of the Gift. Supposing then these Terms to be valid, they cannot support Gifts which are, in themselves, illegal. If the Court puts the two Terms out of its consideration, and views the Will as if they had not been introduced, there is an end of the question.

The boundary fixed by the Law for an Executory Devise is, a Life in being and a Term of twenty-one years. But that Term cannot be a Term in gross; but must be with reference to the minority of the Person from whom the Estate is to go. There is another qualification, and a very reasonable one, to be annexed to this rule, which is, that a Testator, availing himself of the indulgence of the Law in allowing him to limit his Estate at all by way of Executory Devise, is not to commit a fraud on that indulgence, as the Testator in this Case has done, by the use which he has made of these two Terms, and by the number of Lives upon which he has made the Term of one hundred and twenty years to depend. They are twenty-eight in

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number, and eleven of them entirely unconnected with the Persons intended to take beneficially...

In *Thellusson's* Case it was argued that the Testator had, in fact, substituted Years for Lives, and thereby committed a fraud on the indulgence of the Court. There the Lives for which the accumulation was directed were nine only; and the *cestui que vies* were immediately connected with the enjoyment of the Estate. Here the Testator has openly substituted Years for Lives. He might as well have taken the Lives of all the inhabitants of *North and South America* as the twenty-eight he has taken, eleven of whom are perfect strangers to the Persons who are beneficially to take.

It is almost unnecessary to refer to *Lade v. Holford* (y), where the probable suspense of Property for twenty-six years was held to be illegal; and in *Proctor v. The Bishop of Bath and Wells* (z), the probable suspense of Property for twenty-four years was held to be invalid.

Macdonald, C. B. in delivering the opinion of the Judges in *Thellusson v. Woodford*, says: "But it is asked, shall Lands be rendered unalienable during the Lives of all the individuals who compose very large societies or bodies of men, or where other very extensive descriptions are made use of? It may be answered that, when such cases occur, they will, according to their respective circumstances, be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the Lives described, and will be supported or avoided accordingly (a)." And, in speaking

(y) *Amb.* 479. (z) 2 *H. Black.* 358. (a) 1 *N. R.* 387.

of the passages which have been already cited from Lord Nottingham's Report of the *Duke of Norfolk's Case*, he says: "With an easy interpretation, we find from my Lord Nottingham, what that tendency to a perpetuity is, which the policy of the Law has considered as a public inconvenience, namely, where an Executory Devise would have the effect of making Lands unalienable beyond the time which is allowed in legal Limitations, that is, beyond the time at which one in Remainder would attain his age of twenty-one, if he were not born when the Limitations were executed. When he declares that he will stop where he finds an inconvenience, he cannot, consistently with sound construction of the context, be understood to mean where Judges arbitrarily imagine they perceive an inconvenience; for he has himself stated where an inconvenience begins, namely, by an attempt to supersede the vesting longer than can be done by legal Limitation (b)." *Gilbert*, C. B. in his Treatise upon *Uses*, lays down what a Perpetuity is: he says, "1st, That all Limitations that tend to the provision of the Family, and to secure against contingencies that are within the Parties own immediate prospect, are to be favoured; 2dly, all Limitations that perpetuate or tend to perpetuity are, in themselves, void and repugnant to the policy of the Law (c)."

Is it possible for any one, upon reading the Limitations contained in this Will, not to see that they are exactly those to which Chief Baron *Gilbert* alludes as tending to a Perpetuity.

(b) 1 N. R. 386. (c) *Gilb. on Uses*, 3d edit. 259, 260.

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There is another objection to these Limitations—an objection at Law, independent of that which arises on the Executory Devise. They are limited to Children of unborn Persons, and, therefore, come within the rule that a possibility cannot be limited upon a possibility. On these grounds, therefore, it is submitted that these Trusts are illegal, and, being illegal, that they cannot be supported by these Terms, even supposing they are legal, and not used as an evasion of the Law.

The next point is, with respect to the Term of twenty years, which here is taken as an absolute Term. Lord *Eldon*, C. in delivering his judgment in *Griffiths v. Vere* (d) says: "We all know the origin of this Act (e). Previously, I conceive, the Law upon this point to have stood in this way; that you might by Executory Devise prevent an Estate from vesting during a Life or Lives in being, and twenty-one years, and a small portion of time, the period of gestation." It is clear that Lord *Eldon* coupling the twenty-one years with the few months allowed for gestation, clearly referred to minority.

It has been argued that, because by the 39th and 40th Geo. 3, c. 98 accumulation is allowed for an absolute period of twenty-one years, a suspension of the vesting of the Inheritance should be allowed for that period. But that Act was passed for the purpose of regulating accumulation only, and does not in any way affect the rule with respect to the suspension of the vesting of the Inheritance. If that be the case,

(d) 9 Ves. 131. (e) 39 & 40 Geo. 3, c. 98.

there is an end to the Term of twenty years; and the Term of one hundred and twenty years must fall with it, because it is ingrafted on it, and they both constitute one Term: or, at least, the Trusts declared, jointly, of both these Terms, cannot be carried into effect. For here is one period composed of both Terms, upon which the Testator says certain Trusts are to arise. That period exceeds the boundary assigned by Law, and therefore all the Trusts must fail. *Ld. Southampton v. The Marquis of Hertford (f).* *Marshall v. Holloway (g).*

To decide the contrary would violate the intention of the Testator; for he never meant that the Trusts should arise upon one Term and not upon the other; but has declared that they should arise upon that period which was constituted of both Terms. If, therefore, these Terms are in themselves illegal, if they are introduced merely as an evasion and contrivance, and if this Term of twenty years is altogether void, and the Trust of both Terms is in consequence void, it is admitted on the other side, that the direction to convey the Inheritance at the expiration of the Term of one hundred and twenty years is altogether void. For it is quite clear that the Remainders that are to take effect after the Estates which are considered too remote, also fail. That is decided by several authorities, but, particularly, by the late Case of *Beard v. Westcott*. The consequence, therefore, is, that none of these Trusts can be carried into execution, and, therefore, the real Estate has descended to the Heir-at-Law, and the personalty belongs to the next of Kin.

(f) 2 V. & B. 54. (g) 2 Swan. 432,

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Another question in this Case is, whether, in consequence of the direction to lay out this Money in Land, the Heir-at-Law, and not the next of Kin, is to take it. The direction itself, no one can deny it, is legal; but, if there is no object for which the direction can be carried into execution, there is no necessity for laying out the Money in Land, or considering it as Land: but the Court will consider the case as if there were no such direction given. But if the Court shall consider that this direction is to be carried into effect, then the next of Kin will take it as Land. In *Smith v. Claxton* (g), where the converse of this proposition was discussed, all the Cases on that point were considered; and there it was decided that, if a Testator directs real Estate to be sold for certain purposes, and those purposes altogether fail, the Heir would not only take it, but would take it as Land. The Testator has directed his personal Estate to be laid out in the purchase of Land, for a purpose which has altogether failed: and, therefore, the next of Kin will take it, and they will take it as personalty, and not as realty. It makes, however, very little difference to them whether they take it as personalty or as realty. But, under the circumstances of this Case, they take it as personalty. With respect to the Trust for accumulation, if the other Trusts are void, the accumulation altogether ceases. As to the accumulation, there is no objection to it, it is an accumulation allowed by the Act; but if the Trusts are altogether void, the accumulation becomes unnecessary. On the grounds stated it is submitted that none of these Trusts can be carried into effect, and, therefore, that the next of Kin are entitled to the Property as personal Estate.

Mr. *Horne*, Mr. *Shadwell*, and Mr. *Rolfe*, appeared for Mr. *Cadell*, the Executor of the Testator's Widow.

Mr. *Horne* :—The question for the consideration of the Court is, whether, taking the whole of this Will together, it is not a fraud upon the Law against Perpetuity. Not one of the Terms which this Testator has affected to create, has any existence for any purpose but to evade the rule of Law. The Trustees of the Terms have in them the whole legal and equitable fee. The Terms exist on paper only ; in fact, they are all merged in the fee.

In the first place, there is a direction for accumulation. Now it is not disputed that an accumulation may be good for twenty-one years. But if the only purpose of the accumulation be to further the ultimate purpose of the Will, and that purpose be to evade the Law against perpetuity, and therefore cannot take effect, the Trust for accumulation must necessarily fail with it. The object is to give, through the medium of these fictitious Terms, the Estates to be enjoyed according to a course of Limitations which, taken by themselves, would be bad, and to prevent those from having the power to alienate, who, but for these Terms, must take Estates, which, by the general policy of the Law, are alienable. Though the rule of Law be, that no disposition shall be good by which alienation may be suspended for a period longer than a Life or Lives in being and twenty one years after ; yet the converse of this rule is no where laid down, that every suspension during that period is good ; but whatever tends to a perpetuity, or is within the mischief of it is, whatever may

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be the ingenuity with which the particular instrument has been framed, a case for the interference of the Court.

In former Cases the question has been, who was the Person who, at a limited period after the Testator's death, was to take the Estate? and, in the mean time, it has been always clear either that a different set of Persons or nobody at all was to take it. But here the Testator means that, from his death, there shall be takers, Persons who, from his death, shall be Devisees under his Will during the existence of those fictitious Terms of one-hundred and twenty years and twenty years. These Persons are to take, not for accumulation, not for any thing collateral to the Testator's general object, but as Devisees; and, at the expiration of one-hundred and twenty years and twenty years after, a new taker is not to be sought for: but the Person then to take is to be exactly the same as is to take under the previous Limitations, and, therefore, the same individual who, under the previous Limitations, would be in possession of the Estates, as a substantive Devisee, taking in the course of succession prescribed by this Will.

Mr. Shadwell:—It cannot be disputed that a direction to accumulate personal Estate for twenty-one years after the death of the Testator, considered by itself, is good. But although the Trust for accumulation, in this case, is good, having respect to the length of time only during which it is directed to take place, yet, if it is intended for some other purpose which is not good, the Trust itself will become void, and, consequently, those who represent the Widow and next of Kin will be

entitled (i). The question then is whether, inasmuch as the Testator has directed that, at the end of twenty-one years, the accumulated fund shall be laid out in the purchase of freehold Estates, to be settled in the same manner as the devised Estates, the Trusts which are expressed respecting the devised Estates, are good.

In the first instance a question arises whether the language in which these Trusts are expressed be, itself, intelligible; 1st, as to the Term of one hundred and twenty years, if *George Bengough* and twenty-seven other Persons shall so long live. What necessity was there for providing a Term of ninety-nine years if *George Bengough* shall so long live, when that Term was to be taken out of the Term of one hundred and twenty years if *George Bengough* and twenty-seven other Persons should so long live? The Will then proceeds, "and after the determination of the Estate and Interest of each of the same Sons respectively, and also, as the circumstances of the case shall require, after the determination of the Estate of any Person taking, from time to time, under, or as answering the description of Heir Male of his body:" Whose body is here meant? The only Persons mentioned before are the first and other Sons. And then it is supposed that, after the determination of the Estate and Interest of each of these Sons, there may be some Son who, from time to time, may have taken under the description of Heir Male of the body, although no such Person is before mentioned, and, therefore, that the Estate which this Person may have taken, shall have determined. And then the Will proceeds, "in trust for the Person who, for the time

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(i) *Tregonwell v. Sydenham*, 3 Dow, 194.

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being, and from time to time, shall answer the description of Heir Male of his body." So that it is, in substance, a Limitation in trust for a Son for life, and, after his death, and, after the decease of a Person answering the description of Heir Male of the Son's body, in trust for a Person who answers the description of Heir Male of his body. So that the Estate of the Person is to be determined before he takes any Estate at all. And then it goes on to say: "or who, in case of the death of his Parent, if such death had taken place, would be the Heir Male of his body, under an Estate to be limited to the same Son and the Heirs Male of his body." This seems to point to some other case in which the Estate of the Person who was to have taken as Heir Male of the body of the Son, shall have determined, and then to the case of some other Person who, in the event of the death of his Parent, would be the Heir Male of his body, that is, Heir Male of his Parent's body. But it is not said what Estate the Parent himself is to take.

The great question, however, is, whether, as the Testator has directed the Trusts to endure for a Term of one hundred and twenty years, during the Lives of twenty-eight Persons, of whom seven alone are beneficially interested in the Estate, those Trusts are not void? In *Griffiths v. Vere* (k), Lord *Eldon*, C. in commenting upon the decision of *Long v. Blackall*, says: "Whether the Law is according to that Decision or not, it was quite a settled notion, previously, that you might, by Executory Devise, prevent an Estate vesting for a Life or Lives in being and twenty-one years, with

(k) 9 Ves. 127; see page 132.

that small addition at the end of the Life, subject to all questions as to the inconvenience from the circumstance of selecting a great number of Lives, which might be considered *sub judice*." So that Lord *Eldon* did not mean to say that the proposition is generally true. It is, however, a proposition which those who attempt to support this Will, must prove to be generally true. It is obvious that there is a degree of inconvenience arising from the selection of the Lives of a great number of Persons not connected with the Estate. The *Duke of Norfolk's Case* (*1*), which is considered as the foundation, on which this doctrine stands, was a Case decided by Lord *Nottingham*, having regard to the particular circumstance that there was a convenience in making a family arrangement for the benefit of the Persons interested in the Estate; and he held that the Trusts of the Term of two hundred years might be considered as good, having regard to the circumstance that the different Persons who were to take a benefit in the Trusts of the Term, were, themselves, the Persons who were to take an interest in the Estate devised. Lord *Nottingham* applies his argument thus: "The equity in this Case is much stronger, and ought to sway a man very much to incline to the making good this Settlement if he can. It was prudence in the Earl to take care that, when the Honour descended upon *Henry*, a little better support should be given to *Charles*, who was the next man, and trod upon the heels of the Inheritance." And he enlarges upon this observation. Again he says: "If then this be so that here is a Conveyance made which breaks no rule of Law, introduces no visible inconvenience, savours not

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of perpetuity, tends to no ill example, why this should be void only because it is a Lease for years, there is no sense in that. Now if *Charles Howard's* Estate be good in Law, it is ten times better in Equity, for it is worth the considering that this Limitation upon this contingency happening, (as it hath, God be thanked), was the considerate desire of the family the circumstances whereof required consideration, and this Settlement was the result of it made with the best advice they could procure, and it was as prudent a provision as could be made." (m).

There is no prudence in the provisions of this Will. It is an arbitrary, imprudent disposition of Property, and not in the least connected with the benefit of those Persons who are entitled to take under it.

Mr. Rolfe:—By referring to the different *dicta* on the subject, it will appear how the opinion became prevalent in the profession that, by means of an Executory Devise, an Estate might be limited so as not to vest till twenty-one years after Lives in being.

In the first place, it is quite clear that it is of very modern introduction; for, otherwise, that long discussion, and the great difference of opinion which took place in the decision of the *Duke of Norfolk's* Case, could not have arisen. That Case decided, for the first time, that an Executory Trust was good if it took effect during a Life in being: and, if any idea had existed at that time that it would be good for twenty-one years beyond the Life in being, much of the discussion in

(m) See 3 Ca. Ch. 36 & 51.

that Case could not have taken place. Lord *Nottingham* did not mean to decide whether a Life in being was the ultimate point to which the suspension of vesting might be continued. At that time the Case of *Taylor v. Biddal* (n) had just been decided; but it is fair to presume that it was not present to the mind of Lord *Nottingham*, or of the Judges who assisted him, because it was impossible to believe that he would have relied on *Pells v. Brown* (o), if he had known that, either two or three years before, a Case had been decided that went beyond it.

The next Case on the subject is *Massenburgh v. Ash* (p). But it appears from the facts of that Case, that it is not a decision that the Term of twenty-one years may be taken as a Term in gross.

The next Case in point of date is a Case not referring to real Estate at all, but to Personality, and in respect of which the same principle was necessarily applied. It is the Case of *Maddox v. Staines* (q). It is evident, from the judgment in this Case, that it is no authority for taking the Term of twenty-one years in gross, but that it was decided, like the others, merely with reference to the analogy between the Devise to take effect at the end of minority, and a legal Limitation to a Person for Life, with Remainder in Tail, and which Remainder in Tail would not be disposable until the Party obtained his majority.

Next to that comes the very important Case of *Stephens v. Stephens* (r), which had the singular advan-

(n) 2 Mod. 289; Freem. 243; 1 Eq. Ab. 188.

(o) Cro. Jac. 590. (p) 1 Vern. 234.

(q) 2 P. W. 421. (r) Ca. Tem. Talb. 228.

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tage of obtaining the concurrence both of Lord *Talbot* and Lord *Hardwicke*. That, as appears from the Judges certificate, is any thing rather than a decision that a Term of twenty-one years in gross was good. The next Case is *Goodtitle v. Wood* (s). Some part of the judgment in this case does, at first, appear to support the doctrine contended for on the other side; but, when it is considered, as it ought to be, with reference to the context, it leaves the matter precisely where it found it. This was followed by another decision by Lord *Hardwicke*, *Sheffield v. Lord Orrery* (t), in 1745. He very evidently there seems to have entertained the same opinion as he asserted, after the greatest deliberation, in the Case of *Stephens v. Stephens*, in which there was no mention of the Term of twenty-one years as taken absolutely, but as simply referring to the minority of the Party who was to take. In the same year there was decided in the Court of King's Bench, in the time of Lord *Chief Justice Lee*, the Case of *Gulliver v. Wicket* (u). Then comes another Case before Lord *Hardwicke*, *Bullock v. Stones* (x). Now Lord *Hardwicke* does not seem, from any thing that is said there, to have altered his opinion, or to have suspected that a different rule of Law had been established since the decision of *Stephens v. Stephens*. In *Goodman v. Goodright* (y), the Court held that the Devise over was too remote. In Michaelmas Term 1759 occurred a Case that, from the nature and magnitude of the Property, and importance of the Parties concerned in it, underwent before Lord *Northington* as great discussion as any Case ever did, *The Duke of*

(s) *Willes*. 211; and 7 *T. R.* 103, note. (t) 3 *Atk.* 282.

(u) 1 *Wilson*, 185. (x) 2 *Vez.* 521.

(y) 2 *Burr.* 873. See *Harris v. Barnes*, 4 *Burr.* 2157.

Marlborough v. The Earl of Godolphin (z). It appears clear from the judgment, coupled with the expressions used by Lord Northington, that he had the same opinion as his predecessors, Lord Hardwicke and Lord Talbot, entertained, namely, that this term of twenty-one years had never been considered as a term in gross. The next decision is a Case by Lord Mansfield, C. J. (a). This is a very strong Case to show that, so recently as the year 1780, when this Case was before the Court of King's Bench, after it had been argued three times, that Court deciding in the Case before them that the Limitation over was not too remote, referred to the Case of *Stephens v. Stephens*, as being the Case that went the greatest length that the Courts had ever allowed. It plainly appears that the ground on which the Court decided in favour of the Limitation over in this Case was, that the power of alienation would not be suspended beyond that period to which it might be suspended in the case of a Contingent Remainder in Tail. Then there is the Case of *Long v. Blackall* (b), in which Lord Kenyon, C. J. expressly refers to the ground on which the suspension was allowed, as being analogous to the Limitations of a Common Law Conveyance. Then two years afterwards came the Case of *Thellusson v. Woodford* (c), which is an extremely important one, because all the law on the subject was fully discussed; and, in that Case, for the first time, was the precise question mooted. In the first argument before Lord Loughborough, in the Court of Chancery, *Buller*, J. had stated that an Executory

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(z) 1 Eden, 404. See particularly 418.

(a) *Doe v. Fonneron*, 2 Doug. 470.

(b) 7 T. R. 102. (c) 4 Ves. 227.

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Devise of an Estate might be suspended vesting for a Life or Lives in being and twenty-one years after: and then Lord *Alvanley*, M. R. in giving his judgment says: "As to the period of twenty-one years, that could not be his meaning, nor, with submission to the learned Judge who immediately preceded me, has it ever been considered as a term that may, at all events, be added to such Executory Devise or Trust. I have only found this *dictum*, that Estates may be unalienable for Lives in being and twenty-one years, merely because a Life may be an Infant, or *en ventre sa mere*. Therefore I am clearly of opinion that expression cannot be held to mean more than Children in the womb at the Testator's death." This, therefore, if it had been the point in question, would have been a precise decision on the subject. It cannot of course be quoted as going that length: but it is a statement by Lord *Alvanley* evidently made on some consideration and reflection: and, as we find that Mr. Justice *Buller* did not express dissent, we may presume that he acquiesced in it. The Case then came on before the House of Lords (d). There *Macdonald*, C. B. who delivered the opinion of the Judges, says, "The established length of time during which the vesting may be suspended, is during a Life or Lives in being, the period of gestation, and the infancy of such posthumous Child." It is evident that the Judges did not mean to say that, in every case, twenty-one years might be taken. If a Judge were asked what was the utmost limit, he never would say any thing about infancy or minority if he meant a term of twenty-one years, whether there were infancy or no infancy. It is impossible to suppose it should

(d) 11 Ves. 112; see 143.

have been stated as a qualified term of twenty-one years, if an absolute term was meant. Now, having thus detailed the progress of the judicial opinions on this subject, it can only be remarked, in answer to the statement that the opinions of Conveyancers and learned Persons have been otherwise, and that it has been universally stated, in the text-books, that the period is Lives in being and twenty-one years afterwards, that the rule has been stated in too unqualified a manner. But the Law is not to be made to square with the deductions and reasons of the text-writers, but the reasons of the text-writers made to conform to the Law. The invariable criterion, according to the authority of Lord *Nottingham*, of the validity or invalidity of Executory Limitations in point of remoteness, is this; could a corresponding Limitation have been made by a legal Limitation by way of Remainder? Now, in answer to that, two Cases have been cited, one of which was *Lloyd v. Carew*, and in which there certainly was a suspension for a year after the death of the Testator. But there was no suspension of the power of alienation; for, the moment the Life determined, the Estate might have been alienated if the two Parties concurred. The other Case was *Heath v. Heath*. It has been said that there nothing was given to the Son. It was given in fee to the Father, and was given over, solely, in the event of the Father not having a Son who should attain twenty-one years. But alienation might have been suspended, by a legal Limitation, just to the same extent. Suppose the Estate had been given to the Father, for life, with Remainder to the Son, in tail, with Remainder to the Father, in fee, or with Remainder to the Devisee over, in fee, it would have rendered the Property alienable at the death of a Party in being and

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coming of age, that is, it would have rendered it alienable immediately upon the death of the Father, except that the policy of the Law will not allow an Infant to alienate; and that is a want of alienation that no system of Law ever could guard against, because it interferes with what the Law considers more important, namely, the protection of Parties when they have no power to protect themselves.

Mr. Hart, and Mr. Pepys, for *Henry Bengough*, and Mr. Cooper, for *Henry, Richard, and Ann Ricketts*, declined to argue the Case.

Mr. Preston, in reply:—

Although it has been asserted on the other side, by all the Counsel, that a Limitation over, to be valid within the rule against Perpetuities, must be limited to take effect before the expiration of twenty-one years, as a positive term, after the death of a Life or Lives in being; yet they have all differed among themselves as to the terms in which the rule should be stated. If, however, they can be considered as having agreed that the rule is, that the most remote period is Lives in being and the superadded period of infancy, then it is clear that *Lloyd v. Carew* (e), *Gore v. Gore* (f), and *Marks v. Marks* (g), are authorities against it; and these cases all decide that Limitations are valid which are made to take effect after Lives in being and a subsequent term not exceeding twenty-one years, without any reference to infancy. In *Thellusson v. Woodford* the objection was, that the Testator had infringed the Law by taking Lives as the measure of time, without reference to the enjoyment, and the objection did not prevail.

(e) Show. P. C. 137. (f) 2 P. W. 28. (g) 10 Mod. 420.

It is objected that, even if the Limitations in this Will could be good, they are an evasion of the Law and a fraud on the rule. That is a solecism. It is absurd to say that there is a rule of Law which permits the suspension of Property during a given period, and that it is an evasion of the Law to conform to the rule. Nothing which is consistent with the rule can be a fraud on the rule.

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The view taken of the 39th and 40th Geo. III. c. 98, by the Counsel on the other side, is mistaken. It is impossible to say that there are not inaccuracies in the Statute. Lord *Eldon* has said that it is in some respects inaccurately worded. Still, the Statute is a legislative declaration of the validity of a trust for accumulation for a term of twenty-one years, independently of enjoyment. The Statute Law has, by construction only, declared that Lives cannot be taken as the measure of time for accumulation. Even in the case of a Deed the period of twenty-one years may be taken to commence from the death of the Grantor. It is true that direct accumulation is prevented, except for the periods mentioned in the Statute. But there are many indirect modes, as by planting, the management of underwood, &c. &c., in which an accumulation, as extensive in amount, may be made and kept within the period which the Law permits, as could have been by the more direct modes of Limitation which the Statute virtually prohibits; in short, for the periods allowed by the rule against Perpetuities as it stood prior to the Statute, and as it protected the Gifts in Mr. *Thellusson*'s Will.

It has been asserted to be impossible to make a series of legal Limitations, without vesting the legal Estate in

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Trustees, of such a nature as are made in this Will through the interposition of those Trustees in whom the legal Inheritance is vested. But it is a mistake to suppose that valid Limitations of the legal Estate could not be made to take effect at periods as remote as the equitable Interests given by this Will are limited. It is true that, by Will, Interests may be limited in a mode or form that would not be valid in a Deed. Thus in *Lampet's Case* (*h*) the Bequest of a term of years to *A.* for life, and after his death to *B.* for life, was held good as an executory Bequest, although the Gift over, being of a *Chattel Interest*, would not have been valid by Deed. By the rules of the Common Law the first taker would have had the whole term vested in him absolutely. If one is possessed of a term of one thousand years, he may, even by Deed and by the rules of the Common Law, limit it to *A.* for ninety-nine years if he shall so long live, and, after that term, to *B.* for ninety-nine years if he shall so long live. And so any successive number of Lives *in esse* may be taken. It is true that successive Life Estates, as mere Life Estates, limited of terms of years, are not good at Common Law. But a Limitation to *A.* for one hundred years, if *A.* *B.* and *C.*, or any of their issue, shall so long live, is a good Limitation of the term: and the Leases made by the *Liverpool Corporation* are for Lives, or Lives and twenty-one years beyond the Lives.

Although the Case of *Jee v. Audley* has been quoted on the other side, yet it is important to observe that Lord *Kenyon* in that Case stated the rule in these words: "Limitations of personal Estate are void, unless they

necessarily vest, if at all, within a Life or Lives in being and twenty-one years, or nine or ten months afterwards." And there cannot be any doubt, notwithstanding the Certificate in *Beard v. Westcott*, that Lord *Kenyon* stated the rule with accuracy. In any other view than as formerly suggested, it is impossible to reconcile the Case of *Beard v. Westcott* with *Heath v. Heath*. The Limitation in *Beard v. Westcott* was such that neither of the periods exceeded twenty-one years from the death of the person *in esse*, and they were taken with reference to minority. But then it is said the minority to which the periods refer must be the minority of the Person to take under the Limitation. That is a mistake. The period may be taken with reference to the minority of a Person on whose death the preceding Estate is to determine. Therefore in *Heath v. Heath*, where the suspension was with reference, not to the Donee, but to the Son of the preceding Donee, the Limitation was held to be good, although that Son was not to take any benefit under the Limitations of the Will. When the rule is stated to be that the minority referred to must be that of a party to take under the Limitation, it breaks down under the authority of *Heath v. Heath*. There only remains the single *dictum* of Lord *Alvanley* on which the other side rely. But even that Judge (whose authority is very great), did in *Routledge v. Dorril*(i) hold that there might be a power of appointment to more remote Issue as well as to Children, and that no Gift to Issue could be too remote, provided the Issue were *in esse* at the time of the appointment; if not *in esse*, the appointment, to be good, must, by express terms, be brought within the rule as to perpetuities, and

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(i) 2 Ves. jun. 357.

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confined to take effect within a period not exceeding twenty-one years after a Life or Lives in being at the creation of the power. If the Gift were limited to take effect within twenty or even twenty-one years after the Life in being, the Gift would clearly be good. *Jee v. Audley* was decided without impeaching that principle. If the Trust in that Case had been restrained to Issue *in esse* at the death, Lord *Kenyon* declared it would have been good. It was not so restrained, therefore it was decided to be bad.

Leake v. Robinson (k) was another Case of the same kind; because the Gift was to a class of Persons to vest at the age of twenty-four, and they might all have been Persons not *in esse* at the death of the first taker. The Gift was bad because too remote. That decision is consistent with all the Cases which establish that a Gift to take effect after Life Estates, must be limited so as not to be in suspense or contingency for a period to exceed the term of twenty-one years beyond Lives in being. If by any possibility it may happen that the vesting may be suspended beyond the period of Lives in being and twenty-one years beyond the death of the Survivor, the Gift is too remote and void. That is the rule; and every Limitation which must necessarily take effect or fail within that period is superior to all objection.

The Case of *Somerville v. Lethbridge*, which has been relied upon by the other side, is quite consistent with the rule thus stated; for it must be admitted that where after Life Estates are given to three successive generations, of whom one only is *in esse* at the time of the Gift, a Limitation over to the Persons in the third degree

must transgress the limits which the rule as to Perpetuities prescribes. An Estate may be given, for Life, to a person *in esse*, with Remainder to his unborn Child for Life, in tail or in fee, and that Remainder is good; but there cannot be superadded a valid Limitation to the Child of the unborn Child without transgressing the rule, that the Gift over must, to be valid, take effect within twenty-one years after a Life or Lives in being. It is obvious the unborn Child may live long beyond the twenty-one years from the death of the person *in esse*, who is to be the first taker. This probability renders the Gift to the Child in the third degree too remote: But a Limitation to *A.* for Life, with Remainder to his Grandson, to be born within twenty-one years after his decease, notwithstanding the Grandson is to be the Child of an unborn Child, is good. The mere circumstance of the Grandchild, to whom the Remainder is limited, being the Child of an unborn Child is no objection, where the Gift is so limited that it must take or fail of effect within twenty-one years after the Life in being.

The challenge which has been offered against the power to make Limitations, such as those in the present Will, effectual at Law without vesting the Legal Estate in Trustees, may be easily answered. Such a series of legal Limitations may be made, with perfect validity, by recourse to the doctrine of Springing Uses. A Settlement, containing the same series of Limitations as in this Will, may be made without even a recourse to Trustees to support contingent remainders. The Limitations might be to the following effect:

The Estates might be conveyed to Releasees in fee, to the use of *George Bengough*, for ninety-nine years, if

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he so long live and if the Lives of twenty-nine other Persons, or any of them, and twenty years should so long continue, and, if there should be any Person answering the description of Heir of his body, then, on determination of the Estate limited to *George Bengough*, to the use of such Person for ninety-nine years, if he shall so long live and if &c. and from and after the determination of that Estate, during the Lives named and the twenty years, then to the use of the Person who, during the life of those Persons and the twenty years, should next answer the description &c. and so on through the whole series of Limitations in the Will. It may be asked in whom the Freehold and Inheritance is to be made to vest. It is to be limited to the use of the Person who, after the decease of all the twenty-nine Persons named and the end of the twenty years, shall answer the description of Heir Male, &c. as in the Will.

These Limitations, without the intervention of Trustees in whom the Legal Estate might be vested, are all clearly valid Limitations of legal Estates, and they are precisely, in effect, the Limitations in this Will. That they are valid Limitations by way of Springing Use, is clear from the authority of *Davies v. Speed* (l).

It is argued that the *dicta* of the Judges, whose opinions have been cited, must be taken with reference to the history of the Law and the progressive decisions of the Courts on questions of this kind; and it is said that, at first, the Judges were afraid to give effect to a Limitation over after one Life; that afterwards it was

allowed after two successive Life Estates, and that in *Thellusson's* Will the number was extended to nine. Lord *Thurlow* expressly said that any number of Lives might be taken—even a thousand, provided they were all Lives in being at the time of the Gift. It is true, Lord Chief Justice *Wilnot* appears to have said, the term of twenty-one years must be with reference to Infancy; and it is also true that Lord *Alvanley*, forgetting what he had done before, said that the further period beyond Lives in being must be Minority. But these *dicta* cannot prevail against the uniform statement of the rule by the text-writers and the most eminent Judges. The *dictum* of Lord *Eldon*, to which allusion has been made, must be taken with due allowance for the well-known caution of that great Judge, who was speaking at a time when he knew the Case of *Thellusson v. Woodford* was depending before the House of Lords. But, even then, Lord *Eldon* mentioned twenty-one years as a limit of time beyond Lives in being. In all the text-writers, *Fearne*, *Butler*, *Cruise*, and the time is stated to be twenty-one years, without any mention of minority. No doubt the period of twenty-one years was taken with reference to convenience, and because it is the period during which minority lasts, and because, in the ordinary course of Settlements, the power of alienation may not be complete and absolute till the determination of Lives in being and twenty-one years. All that is necessary to render a Gift valid within the rule against Perpetuities is, that it be clearly ascertainable, within this period of Lives and twenty-one years, who is the Person to take; and it must be immaterial in what way the description is made, so as there cannot be any doubt who is the Person whom it designates, when the time arrives at which the Gift is

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to take effect. Suppose a Gift to be made to *A.* in fee, and a Gift over to take effect in case any Person, living or born on the day of his death, shall appear at *St. Paul's* within twenty-one years after the death of *A.*, the Gift over would be good; for the happening of the event would make the Person certain; and it is laid down, in *Perkins*, that a Remainder limited to a Person who shall first come to *St. Paul's*, is good.

Though such Limitations as are contained in this Will may appear whimsical to strangers, they are often wise and provident arrangements with a view to the circumstances of particular families. If the late *Duke of Bridgewater* had not framed his Will with similar provisions, he could not have secured to the Public those great schemes which produced so much benefit to the Country, as well as to the Parties who took beneficial Interests under his Will. The plan of that Nobleman was, in order that the magnificent Canals he had planned might be completed, to keep together his property, to appoint Managers for carrying on the Works, and to give the Parties, who were to take the first benefits under the Will, no control beyond taking certain parts of the Rents till the scheme was completed; well knowing that if he had left the whole control and management of the Canals to the Parties to whom the first benefit was given, his Canals and their business would have been neglected, and his schemes frustrated: therefore, with the view of securing the conduct of his great Works, under proper management, he directed the accumulation, and ordered that the Manager of them should have so large a sum as 4,000*l.* a year, in order to secure a competent Person. That plan was com-

pletely successful, and the Works projected by that Nobleman have, through the means of the Limitations of his Will, been preserved and entirely carried into effect, and their values increased and are increasing. Nor has any suspicion ever been breathed as to the validity of those Gifts, though the present Will follows exactly that model. And it even happens that one of the Trustees under the *Duke of Bridgewater's* Will (the late Chief Baron *Macdonald*) was one of the Judges, who delivered his opinion in *Thellusson's* Case, in the House of Lords, with full knowledge of the Limitations in the Duke's Will.

The Counsel on the other side have been challenged to point out the particular part of this Will to which they object; but they have declined to do so. They content themselves with general objections to the whole course of Limitations. But, even in their view, the Limitations must be good to some extent: and it is for them to point out which of them in the series is too remote. It would be impossible to object to the entire Will, even if some of the Limitations were too remote: *Tregonwell v. Sydenham* has decided that the *cy pres* doctrine must prevail. An attempt to get rid of the whole Will, by treating it like a case of obscurity and uncertainty, must fail in this case; for the Limitations are expressed without any ambiguity.

The objection that there must be a merger of some of the terms created by the Will, is without foundation. The terms are merely part of the scheme. They are not terms limited in the ordinary manner and for the ordinary purposes. They are merely expressed as measures of time.

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The only question is, whether the Limitations in this Will are within the rules of Law against Perpetuities. Whether the Gifts or the objects of them are of a beneficial kind or not, is of no consequence, provided they are legal. The policy of permitting such Gifts cannot be questioned in this place. This Court is not to make or alter the Law, but to administer it. Perhaps, if many Persons were to frame Wills on this scheme, some prospective legislative provision might be necessary. But such cases are (as might be expected) very rare. There are only two Wills of the kind known to exist. The validity of Lady *Denison's* Will (m), which directed accumulation to a considerable extent, has never been questioned.

The objection, taken on the ground of obscurity or uncertainty, refers to that part of the Will which describes the Persons who, in certain events, are to take. The difficulty in framing that part of the Will, proceeded from the necessity of using the words "Heir Male" as words, not of limitation, but of description, so as to avoid the operation of the rule in *Shelley's* Case. The Person to be described was the Person who should, at the time, be Heir Male. In the Case of *Thellusson's* Will, the same objection as to obscurity or uncertainty was taken; but the Judges decided there was sufficient certainty. The present Will was framed with *Thellusson's* Will for a guide against those inaccuracies which suggested objections, and with the advantage of all the observations made in the repeated discussions of the Case of *Thellusson v. Woodford*.

(m) Mentioned 4 Ves. 286, and 11 Ves. 115.

The Trustees of the Will having, under the Trusts of the term of twenty-one years, laid out a considerable sum of Money, arising from the surplus Income of the Testator's Estate, in the purchase of other real Estates, and the Testator having declared, *after* directing that investment, that the Estates to be purchased by his Trustees should be conveyed to them upon the Trusts "hereinafter" declared of his devised Estates, the Plaintiff, *George Bengough*, as the Testator's Heir-at-Law, claimed the Rents of the newly purchased Estates, as being undisposed of during the term of twenty-one years. The Trustees, on the other hand, contended that it was the Testator's intention that the newly purchased Estates should be subject, in all respects, to the same Trusts as the devised Estates, and that, therefore, the word "hereinafter" ought to be construed either "hereinbefore," or "herein."

The following are the arguments used by Mr. *Heald* and Mr. *Piggott*, for the Heir-at-Law:

A Testator's intention cannot be collected except from the words he uses; and if in this case the word "hereinafter" were to be changed into "hereinbefore," or "herein," the sense of the passage would be entirely altered. Does it follow, because the Testator has directed the Rents of the Estates of which he died seised to be laid out in the purchase of other Estates, that he intended that the Rents of the Estates to be purchased should be laid out in the same manner? Supposing that the Court could, from the context of the Will, infer that such was his intention, it could not convert his intention into an actual Devise.

It cannot be denied that the Testator, after directing the Rents, when they amount to 500*l.*, to be laid out

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in the purchase of Three per cent Consols, has ordered that the Dividends of those Consols shall, during the term of twenty-one years, accumulate in the same manner and for the same purposes as the Rents and Profits of the real Estates to be purchased had been by him directed to accumulate. But he has said that those very Estates shall be subject to the Trusts and Purposes "hereinafter declared;" which Trusts and Purposes have no reference whatever to accumulation. So that to say that the Rents of the purchased Estates are to accumulate, would be in direct contradiction to the language used by the Testator. Admitting, however, that the Clause which directs the Dividends of the Stock to be accumulated, does afford evidence of an intention that the Rents in question are to be accumulated, is that sufficient to authorize the Court to order that they shall be accumulated? Where is the authority for that? The Case of *Shelley v. Bryer* (n) decided that, where a previous Gift is plain, the Court will not allow the effect of it to be controlled by subsequent words which are inconsistent. Where words are sometimes used, in speaking or writing, in a sense which they do not properly bear, the Court will, if the general intention of the Instrument require it, construe those words in that sense. But where a word, such as "hereinafter," admits of only one meaning, there is no instance of the Court construing it in a sense diametrically opposite, and saying that it meant "hereinbefore." When the Testator directs how the Estates to be purchased with the residue of his personal Estate shall be disposed of, he does it by reference to his devised Estates: he does not allude to the Estates to be purchased with the

(n) Jacob, 207.

accumulated Rents; and, throughout the Will, he makes a distinction between those Estates and the Estates of which he was seised. The residuary Clause furnishes a strong argument against the construction contended for. When the Testator gives his personal Estate, and directs it to be laid out in the purchase of Land, he uses words, with respect to the Land so to be purchased, clearly referring to the term of twenty-one years; but he does not use the same words when speaking of Lands to be purchased with the Rents. In the one case he does not refer, in the least, to Limitations; but, in the other, he speaks of Restrictions, Limitations and Charges. Now what are these Restrictions, Limitations and Charges? They are the Restrictions, Limitations and Charges declared of or concerning, not all the said Estates, not of the Estates to be purchased, but of the Estates devised to the Trustees.

The Testator has made no provision for his Nephew *George Bengough* during the life-time of his Widow, unless he intended him to have the immediate enjoyment of the Estates in question. The Widow might have lived during the whole period of twenty-one years: and it is very improbable that the Testator intended his Nephew should have no provision during that time. The words "so to be purchased," were perhaps used, by mistake, for "so by me devised."

Mr. *Preston* and Mr. *Wilbraham*, for the Trustees, argued in substance, as follows:

Mr. *Preston* :—The point in dispute has been already conceded in argument: for it has been said that the intention is clear, but that there is an inconsistent Clause, and also that there is another clause which is

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inconsistent with the former. Now, it is one of the clearest principles of Law that, when there are two clauses in a Will, and one is inconsistent with the other, the latter shall prevail over the former. Courts are most anxious to give effect to the intention, whenever it can be discovered; and there is no doubt whatever, in this Case, of the intention. The Will, from the beginning to the end, shows that the Testator's object was accumulation, and to suspend the enjoyment of the Property as long as he could do it consistently with the rules of Law. It has been admitted that that was the case with reference to the Personal Estate, which was the bulk of this Testator's property. Whenever there is an inconsistency in a Will, the Court will endeavour to reconcile all the parts of it. There is no impropriety in striking out the word "hereinafter," if that expression is inconsistent with the whole plan of the Will. It is allowed to be inconsistent, and to have been inserted, by mistake, for "hereinbefore," in that part of the Will; and the other side are obliged to alter the language, in order to found their argument and to avoid the inconsistency. A Gift to the first and other Sons to be begotten is, in point of Law, a Gift to the first and other Sons begotten or to be begotten. Again, a Gift to the first and other Sons hereafter to be begotten, has been held to include Sons previously born. No one who looks at this Will can doubt that what the Testator meant to accumulate for twenty-one years, was the whole of his Property. Is it not then absurd to contend that the Testator meant the Rents of his devised Estates, which were small in amount, to accumulate, and that he did not mean so as to the Estates to be bought with his immense Personal Estate? The Testator has provided

an annuity of 300*l.* for his Nephew, to commence at the death of his Widow, who was very old; would he have so done if, upon the first Estate being purchased, his Nephew was to have the Income of it? The Testator never could intend to give his Nephew two species of Income, at one and the same time, out of one and the same Property: for it is impossible to deny that the Annuity was to issue out of the entire Fund, as constituted of the devised Estates, the Personal Estate, and the Estates to be purchased. The word "herein" would reconcile all inconsistencies: and there is no difficulty in the Court saying, upon the context of the Will, that that is the real sense and meaning of the word. Supposing, however, that it is not allowable for the Court to alter the meaning of the word, yet as the Testator, in a subsequent part of his Will, has declared that the Rents and Profits of the Estates so to be purchased as aforesaid were by him directed to accumulate, it may be fairly argued that the word "hereinafter" has reference to that direction, and that the Testator has, in fact, said that the Rents of the purchased Estates are to be disposed of according to what is declared in the subsequent part of his Will, one of such declarations being that the Rents and Profits of those Estates are to accumulate. The intention is clear; and the parts of the Will will be inconsistent with each other unless either "hereinafter" is construed "herein," or, if taken in its natural sense, is referred to the Clause which directs the Rents, of the Estates to be purchased, to accumulate. If the Testator has directed those Rents to accumulate, the word "hereinafter" expresses his intention just as much as the word "herein."

A distinction has been made between the Estates

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to be purchased with the residuary Personal Estate, and those to be bought with the Rents of the real Estates. But, when the point is considered, it will be clear that, if the Plaintiff is entitled to the Rents of the latter Estates, he is entitled to the Rents of the former also. Now it is evident, from the Trust for accumulation for twenty-one years, that the Income of the accumulations was destined for the purchase of real Estates; and it would be incumbent on the Trustees to have the accumulations so invested. But the Rents of the Estates to be so purchased would be, by force of the Trust during twenty-one years, to be accumulated. Now there would be an Income again arising from the Estates so purchased, which Income must, necessarily, according to the argument for the Heir, go precisely in the same manner as the Income of the Estates purchased with the produce of the Rents accumulated from the real Estates. This is arguing in a circle, and shows the inconsistency there would be in adopting the construction which the Heir contends for.

Mr. *Wilbraham* :—The Testator directs that the Trustees shall never permit a larger Sum than 500*l.*, arising from the Rents and Profits of his real Estates, to remain, at any one time, in the hands of any Banker, but that, as often as there shall be that Sum in hand, the same shall be laid out in the purchase of Three per Cent Consolidated Bank Annuities, in the names of the Trustees, until a convenient Purchase or convenient Purchases can be found, or until a sufficient sum of Money shall be accumulated to make a proper Purchase or proper Purchases; and he directs that the Interest, Dividends and Income of such Three per Cent Consolidated Bank Annuities shall, during the said

term of twenty-one years, and no longer, accumulate in the same manner, and for the same purposes as the Rents and Profits of the Real Estate so to be purchased as aforesaid were by him directed to accumulate. Now, if the construction of the Will be that there is no direction for the accumulation of the Rents of the Estates to be purchased, there will be a manifest inconsistency in the Clause in question: for, in the former part of it, the Testator says that the Rents, when they amount to 500*l.* shall be laid out in order to accumulate for the purchase of real Estates, and, in the latter part, that the Dividends and Income of such Three per Cent. Consolidated Bank Annuities shall accumulate in the same manner and for the same purposes as the Rents and Profits of the real Estates, so to be purchased as aforesaid, were by him directed to accumulate. Now, under the construction contended for on the other side, there is no direction for accumulation.

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The *Vice-Chancellor*, at the conclusion of the argument, ordered that the Cause should stand over, in order that the Authorities relating to the question might be produced; and on this day the Cause was 5th December. again called on.

Mr. Preston :—It is evident, from the context of the Will that the word “hereinafter” has been written instead of “herein,” or “hereinbefore.” The object of the Will, throughout, is accumulation for a given period, and the difficulty in the construction of the word “hereinafter” is as to the accumulation only subsequent to the Testator’s death, and not as to the state of the Property at the time when the Testator died. The question simply is, whether there is a suspension of the

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enjoyment, or an omission to give a beneficial interest in the Rents arising from Property to be purchased after the Testator's death. The Court is to be satisfied whether the Authorities are strong enough to enable it to rectify the slip, or to supply the word necessary to carry into effect all the accumulation which was clearly intended.

Doe dem. James v. Hallet (o) is a Case very similar to the present. In that Case, to carry into effect that which, from the context, appeared to be the clear intention of the Testator, the Court held that the words in the Will, "to be begotten," and "hereafter to be born," were to be rejected, and that a second Son who was born before the date of the Will, was the object of the Testator's bounty, and entitled as Devisee, notwithstanding these expressions seemingly referable to a Son already born. The language of Lord *Ellenborough*, C. J., in delivering judgment in that Case, is particularly applicable to the present Case. His Lordship said: "It would be a matter of the deepest regret if, in consequence of the joint effect produced by the blunder of the Testator and the neglect of his Attorney, we were compelled to put a construction on this Will which would defeat the Testator's intention."

In *Tollett v. Tollett* (p), a Case decided on the intention, the words "whereby the Estate shall come to *George Tollett*" were rejected, although they expressed the event on which a Portion was to be raised; and, on a rehearing, the Court decided that the Portion should be raised, although *George Tollett*, who was Tenant for

Life, had died before the Estate came to him. True it is that *Doe dem. Spencer v. Godwin* (q) was a Case in which, on the construction of a Lease in which there was a Covenant not to assign, and in a subsequent part of the Lease there was a Proviso for Re-entry in case of breach of the Covenants "hereinafter contained," and the only Covenant inserted after those words was a Covenant for quiet enjoyment, the Court refused to reject the word "hereinafter," and held that the Lessor could not enter for breach of the Covenant not to assign. But Cases of that kind are very different from the present Case, since the Court is not required to alter words on the ground of any want of knowledge of the intention. Where the intention is clear, the Court has, in a series of Cases, altered, rejected or transposed words. As in *Coryton v. Helyar* (r), the Court supplied the words "if he shall so long live." In *Doe dem. Leach v. Micklam* (s), the words "and after her death," were supplied; the Court relying on the authority of *Fomereau v. Fonnereau* (t), in which similar words were supplied in order to give effect to the evident intention. In *Spalding v. Spalding* (u), the Court, in construing a Will, decided that the words "without issue" must be supplied in order to give effect to the Devise over as an expectant remainder. So in *Strong v. Teatt* (x), the Court supplied words to confine the generality of a Devise, in order to exclude certain Estates, that effect might be given to an intention to be collected from the different parts of the Will. The same principle was acted on in *Smith v. Shouldham*, a Case not reported, and which was heard on Appeal before

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(q) 4 M. & S. 265. (r) 2 Cox. 340. (s) 6 East, 486.
(t) 3 Atk. 315. (u) Cro. Car. 185. (x) 2 Burr. 912.

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the House of Lords, 3d June 1818. *Clayton v. Lowe* (y) is to the same effect; and so also is *Luxford v. Cheeke* (z). In *Shergold v. Boone* (a), the Court rejected, or rather construed the words "who shall be living at my decease," and admitted Children born in the Testator's lifetime. And in *Wykham v. Wykham*, the *Lord Chancellor* said that words might be supplied in a Will where necessary in order to give effect to the clear intention.

Mr. Heald and Mr. Piggott, for the Plaintiffs:—

In all the cases which have been cited it will be found that they were Cases in which the Court supplied or rejected the words, because the Instrument would otherwise have been insensible, repugnant, or unintelligible. There is no such reason in this present Case for altering the word.

Mr. Sugden, for the personal Representative of
Mrs. Ricketts:—

The Testator has not, on the face of the Will, done enough to enable the Court, from what is before it, to alter the word. The rule laid down in *Chapman v. Brown* (b) must regulate the Court in Cases of this nature, and the present Case is not within the rule.

Mr. Hart and Mr. Pepys appeared for *Henry Bengough*, and some other Parties in the same Interest; and *Mr. Cooper*, for *Henry, Richard, and Ann Ricketts*, but they declined to address the Court.

(y) 5 B. & A. 636.

(z) 3 Lev. 125; and reported also by *Lord Raymond*, under the name of *Brown v. Cutler*.

(a) 13 Ves. 370.

(b) 3 Burr. 1626.

Upon the first point the *Vice-Chancellor* gave Judgment in a few words, upon the rising of the Court for the long vacation, stating that, although the rule of Law be framed by analogy to the Case of a strict Settlement, where the twenty-one years was allowed in respect of the infancy of the Tenant in Tail, yet he considered it to be fully settled that Limitations by way of Devise or Springing Use might be made to depend upon an absolute term of twenty-one years after Lives in being.

On the second question the *Vice-Chancellor* delivered his Judgment to the following effect :

The Testator gives to his Widow an Annuity of 4,000*l.* charged upon his real and personal Estate, and, after the death of his Wife, he gives to his Nephew, *George Bengough*, who was his Heir-at-Law, out of the Rents and Profits of his real Estate, an Annuity of 300*l.* for his personal support, without any power of alienation ; and, to another Nephew, *Henry Bengough*, an Annuity of 200*l.* also out of the Rents of his real Estates, for his personal support ; and, subject to these Annuities, he devises his real Estates, except a House in *St. James's Square* in *Bristol*, to his Trustees named in his Will, and their Heirs, upon trust, as to his House called *Penn Park*, to permit his Wife to reside in it during her life ; and, as to the rest of the real Estate, to receive the Rents and Profits for a term of twenty-one years, and, from time to time, to lay out the Monies to arise therefrom in the purchase of freehold Estates of Inheritance, as often as there shall be a surplus in their hands amounting to the sum of 1,500*l.*; and he directs that such real Estates so to be purchased shall,

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from time to time, be conveyed to the Trustees, upon the same Trusts, and for the same intents and purposes as are in his Will thereafter "limited concerning his real Estates thereinbefore devised to his Trustees; and he directs that his Trustees shall not permit a larger sum than 500*l.* to remain in the hands of any Banker, out of the Rents and Profits of his real Estates; and that, as often as such Rents received by them shall amount to 500*l.*, they shall be laid out in the purchase of Three per Cent. Consolidated Annuities, and that the Dividends of such Stock shall, during the said term of twenty-one years, accumulate in the same manner, and for the same purpose as the Rents and Profits of his real Estates, so to be purchased as aforesaid, are by him directed to accumulate. He then proceeds to limit, the Estates devised by him, in a most laborious manner, for the purpose of rendering those Estates unalienable as long as the rules of Law will permit, making his Nephew and Heir-at-Law, *George Bengough*, the first object of his bounty; and he afterwards gives Legacies, to a very large amount, out of his personal Estate, and then limits his residuary personal Estate to the same Trustees, upon trust, during twenty-one years, to invest the Income and the accumulations of the Income, in the purchase of Stock, or upon Mortgage, as an accumulating Fund, and to lay out the Principal of the Residuary Estate in the purchase of Lands in fee simple, to be conveyed to the Trustees upon the same Trusts as are in his Will declared concerning the Lands thereinbefore devised to them, or as near thereto as may be.

The question now to be considered arises upon that

part of the Will of the Testator in which he directs the real Estates, to be purchased with the surplus Rents and Profits during the term of twenty-one years, to be conveyed to the Trustees upon the same Trusts, and for the same intents and purposes as are in his Will there-“after limited concerning his real Estates thereinbefore” devised to his Trustees. The only Trusts thereafter limited concerning his real Estates thereinbefore devised, are the beneficial Trusts expressed in the laborious Limitations to which I have before referred ; and, if this direction is literally followed, the effect would be to give to *George Bengough*, the Heir-at-Law of the Testator, who is the first object of these Limitations, an immediate Life-interest in the freehold Estates to be purchased with the surplus Rents and Profits during the term of twenty-one years.

It is argued that, taking the whole Will together, this effect would be manifestly contrary to the intention of the Testator; and that the plain purpose of the Testator was, that these Rents and Profits should be laid out to accumulate in the same manner as the Rents and Profits of the Estates in the Will before devised and that there has been an accidental slip in the expression ; and, if the words “thereinbefore limited” were substituted for the words “thereinafter limited,” the whole Will would be made consistent. It is not to be doubted that the substitution of the word “thereinbefore” for the word “thereinafter” would have the effect of inducing an accumulation of these Rents and Profits, in the place of giving them to the immediate enjoyment of the Defendant, *George Bengough*; and, the inquiry is, whether, upon the whole Will, the Testator has expressed such purpose ; for no Court can

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give effect to such purpose unless it be gathered from the express words in the Will.

After directing these Estates, to be purchased with Rents and Profits, to be conveyed to the Trustees, in the manner and trusts stated, he proceeds to direct that, as often as such Rents and Profits received by his Trustees shall amount to 500*l.*, they shall be laid out in the purchase of Three per Cent Consolidated Annuities; and that the Dividends of such Stock shall, during the term of twenty-one years, accumulate in the same manner, and for the same purpose as the Rents and Profits of the real Estates, so to be purchased as aforesaid, are by him directed to accumulate. The only part of this Will which contains any direction as to these Rents and Profits, is the passage in question: and here, therefore, is a plain declaration of the Testator that he did, by that passage, mean to direct the accumulation of these Rents and Profits. And, consistently with that intention, he directs that the Dividends of the Stock which were to serve for Investments until freehold Estates could be purchased, should, in like manner accumulate. Now this expressed purpose of the Testator can only have effect by the substitution of the word "hereinbefore" for hereinafter; and, to effect such purpose, the Court is bound to make the substitution.

There are other parts of the Will which, though alone not to be relied upon, afford strong inference that such must have been the intention of the Testator, *viz.* the general purpose of accumulation, which runs through the whole Will, and the circumstance that he has given an Annuity of 300*l.* to *George Bengough* for his life,

and for his personal support and maintenance, who was the first object of his Limitations ; which is altogether inconsistent with an intention that he should take an immediate Interest, of considerable value, in the Rents and Profits in question.

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and
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Laches.

TODD v. AYLWIN*.

THE original Bill in this Cause was filed in 1816 against the Persons interested in the Freight of a Ship, which had been chartered by the Plaintiff. The prayer was, that an Account might be taken of how much was due in respect of the Freight ; that the amount of certain Losses or Injuries, alleged to have been sustained by the Plaintiff, through the neglect or default of the Owner or Master of the Vessel, might be ascertained and deducted from the amount of the Freight ; and for an Injunction to restrain the Defendants from proceeding in a Suit in the Admiralty Court, and in an Action at Law against the Plaintiff to recover the Freight.

The Plaintiff obtained the common Injunction for want of an Answer, and that Injunction was afterwards, on the usual affidavit, extended to stay Trial.

In Trinity Term 1825, Exceptions taken by the Plaintiff to the Answer of one of the Defendants were

The original Bill being for an Account, and an Injunction to restrain an Action ; and the Injunction being dissolved on the merits nearly ten years after the Bill was filed, the Plaintiff filed a supplemental Bill for a Discovery, and Commission to examine Witnesses in aid of his Defence to an Action substantially the same : Motion for the Commission refused, with Costs, on the ground of delay.

* Ex Relatione.

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allowed; on which the Plaintiff amended his Bill and added a prayer for a Commission to examine Witnesses in aid of his Defence to the Action at Law.

On the 28th of June 1825, one of the Defendants in whose name the Action was brought, died; and the Defendant *Aylwin* having taken out Administration to him, the Plaintiff filed a Bill of Revivor against him, and obtained an Order to revive.

On the 25th of January 1826 the Defendant *Aylwin* obtained an Order *Nisi* for dissolving the common Injunction, and, on the 18th of February following, the Plaintiff having shown cause against dissolving the Injunction, the Court ordered it to be dissolved absolutely.

On the 14th of June 1826 the Plaintiff filed a Supplemental Bill against the Defendant *Aylwin* alone, alleging that, by various events which had happened since the Plaintiff had exhibited his original Bill, the Defendant *Aylwin* was the only person who had or claimed to have any Interest in the Freight in question, and that he had lately commenced a new Action at Law against the Plaintiff, as Administrator of the deceased Defendant, in whose name *Aylwin* had brought the former Action, as having a beneficial, though not a legal interest in the Freight. The Plaintiff prayed, by this Supplemental Bill, the same relief against the Defendant *Aylwin* as the original Bill had prayed against all the Defendants thereto, and also for an Injunction to restrain the Defendant's Action at Law, and for a Commission to examine Witnesses abroad, and that the Plaintiff might have the benefit of Evidence

taken under the Commission to support his Defence at Law.

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To this Supplemental Bill the Defendant demurred.

in ante 5

Mr. Heald and Mr. O. Anderdon, for the Demurrer:—

All that is stated as supplemental matter is immaterial, and does not in any degree alter the nature of the Case. The only material facts stated are not supplemental matter. For the purpose of the Injunction the Bill of Revivor was sufficient, without the present Supplemental Bill. *Turner v. Wright* (a). In *Adams v. Dowding* (b) it was decided that where in a Supplemental Bill all that was stated as supplemental matter was immaterial, a Demurrer would hold.

Mr. Agar and Mr. Parker, for the Bill:—

The Action commenced by the Defendant since the Bill of Revivor was a new Action, and unless a Supplemental Bill had been filed, none of the evidence taken under the Commission could have been read in aid of the Defence to that Action. Besides the Title stated by the original Bill was only partial, and this Supplemental Bill, for the first time, shows that the whole Title is in the Defendant.

Mr. Heald, in reply:—

It would be exceedingly hard if the evidence under a Commission could not be read in aid of the last Action without a Supplemental Bill. Suppose a Commission had actually issued under the first Bill, and that, after it was returned, but before the evidence could be used,

(a) 1 Jac. & Walk. 290.

(b) 2 Madd. 53.

CASES IN CHANCERY.

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v.
AYLWIN.

the Plaintiff at Law died, so that there must be a new Action by his Representative (there being no Revivor at Law), would the Representative not be entitled to use the evidence obtained under the Commission ?

The *Vice-Chancellor* overruled the Demurrer.

On the 4th December 1826, the Defendant having put in his Answer to the Supplemental Bill, obtained the Order *Nisi* to dissolve the Injunction which had issued in that Suit. The Plaintiff then gave notice of a Motion for a Commission to examine Witnesses abroad. That Motion was heard at the same time as Cause was shown by the Plaintiff against dissolving the Injunction.

Mr. *Agar* and Mr. *Parker*, for the Plaintiff.

Mr. *Heald* and Mr. *O. Anderton*, for the Defendant.

The *Vice-Chancellor* dissolved the Injunction upon the merits, and refused the Motion for a Commission with Costs, stating that the Plaintiff having for ten years acted on this Bill as a Bill for equitable relief, could not be permitted, when driven from his alleged equity, to treat his Bill as if a Bill for Discovery merely, and now to seek for that Commission which, if sought at all, ought to have been applied for ten years ago, the present Action being substantially the same as was pending when the original Bill was filed.

AMPHLETT v. PARKE.

1827.

21st March &
25th April.

Will.

Conversion.

Tenant for Life
of Residue.— *SC. 4 July 1827.*

MARTHA CLAY, Spinster, by her Will, dated the 19th of August 1790, and executed and attested so as to pass Freehold Estates, disposed of her Property as follows:

"I give and devise all my Freehold and Copyhold Estates in the county of Essex unto and to the use of *Nicholas Martyn*, esq. and *Rawson Parke*, esq. their Heirs and Assigns, upon trust to sell the same, either by public auction or private contract. And I will and direct that the Monies to arise from such Sale be considered and taken to be part of my personal Estate." (The Testatrix, after directing that the receipts of her Trustees should be sufficient discharges to the Purchasers, proceeded as follows:) "And I do hereby will and direct that, out of the Monies to arise from such Sale, and out of all other my personal Estate, the several Legacies hereinafter mentioned be paid and satisfied, (that is to say,) to *Lydia Ward*, Wife of *Francis Ward*, esq. 500*l.*; to *Elizabeth Cooke*, Widow, the like sum of 500*l.*; to *Elizabeth Parke*, Wife of the said *Rawson Parke*, the sum of 1,000*l.*; to *Lydia Amphlett*, Widow, 1,000*l.*" (The Testatrix here gave Legacies to several other Persons, and then continued thus:) "And all the residue of my personal Estate, and of the Monies arising from the

Testatrix gave her Real and Personal Estate to Trustees to sell, and directed that the Proceeds of her Real Estate should be taken as part of her Personal Estate, that out of the Monies to arise by such sale, and out of all other her Personal Estate her Legacies should be paid, and gave the Residue to *A.* for Life, with remainder over: Held that the Real Estate was absolutely converted into Personality, and that some of the Legacies which had lapsed belonged to the Residuary Legatee, and not to the Heir.

3 Sim 53d
19th April 1790
752.

The Legacies not having been paid within the year after the Testatrix's death, *A.* is not entitled to that year's Income, but it forms part of the Capital of the Residue.

VOL. I. *1^o Brown on Appeal decided in favor of the heir 12th of Dec 1831. An appeal was brought to the High Court of Justice. The cause was compromised in 1831 May 2nd & K. 652. et seq. ob. M. P. 16 660-661.*

1827.
—
AMPHLETT
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sale of my real Estates, I give and bequeath to the before-named *Nicholas Martyn*, his Executors, Administrators and Assigns, upon trust to pay the Interest thereof to the before-named *Elizabeth Parke*, for her life, for her separate use: and, after her death, upon trust to pay and divide the Capital to, between and amongst all and every the Child and Children of the said *Elizabeth Parke*, born and to be born, equally, share and share alike, the respective shares of the Sons to be paid at twenty-one, and of the Daughters at twenty-one or marriage, which shall first happen, with benefit of Survivorship between them, in the event of the death of one or more of them before such age or time as aforesaid, not only as to their respective original shares, but likewise as to all such share or shares as shall accrue to them, respectively, by Survivorship; and, if there shall be but one such Child, then to such only Child, at such age or time as aforesaid; but, in case there shall not be any Child, who being a Son shall live to attain the age of twenty-one, or being a Daughter shall live to attain the age of twenty-one or marry, then upon trust to pay the Interest thereof to the before-named *Lydia Amphlett*, for her life, for her separate use; and, after her death, upon trust for all and every her Child and Children, born and to be born, in such manner, and with such benefit of survivorship, as I have hereinbefore directed concerning the Child and Children of the said *Elizabeth Parke*: and, in case neither the said *Elizabeth Parke*, or the said *Lydia Amphlett* shall have any Child who shall live to attain such age or time as aforesaid, then upon trust, as to one moiety, for the Executors or Administrators of the said *Elizabeth Parke*, and, as to the other moiety, to the Executors or Administrators of the said *Lydia*

Amphlett. And I appoint the said *Nicholas Martyn* and *Rawson Parke* Executors."

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The Legacies much exceeded the Personal Estate in amount: and, some of the Legatees having died in the Testatrix's lifetime, the question was, whether the real Estate was absolutely converted into Personality, so that the lapsed Legacies fell into the Residue, or whether the conversion was partial only, and therefore those Legacies belonged to the Heir.

Mr. Sugden, for the Heir, relied upon *Cruse v. Barley* (a), and referred to *Maughan v. Mason* (b), and *Jones v. Mitchell* (c).

Mr. Horne and Mr. Boteler, for the residuary Legatee, said that the Testatrix had expressly declared that the proceeds of the Sale of her real Estate should be Personal Estate: that the Sale was directed, not for a particular purpose, but for all purposes: that both Estates were blended together: that the Testatrix, after speaking of the Monies to arise from the Sale of her real Estates, used the words, "all other my Personal Estate:" and they cited *Mallabar v. Mallabar* (d), and *Durour v. Motteux* (e), which they said were not so strong in favour of the residuary Legatee as the present case; and that in *Durour v. Motteux* there was no direction that the proceeds of the real Estate should be considered as Personality: and that in *Jones v. Mitchell* the two Estates were not blended together.

(a) 3 P. W. 20. (b) 1 V. & B. 410. (c) 1 Sim. & Stu. 290.
(d) Ca. Temp. Tabl. 78. (e) 1 Ves. 320.

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Another question arose in this Cause under the following circumstances.

The Testatrix died on the 14th of July 1803. The Legacies were not paid within the year after the Testatrix's decease. In 1819 Mrs. *Parke* died without Issue. The *Master*, in taking the accounts of the Receipts and Payments of the Trustees and Executors, had allowed the Defendant, *Rawson Parke*, a year and a half's Rent of the real Estates from Lady-day 1803 to Michaelmas 1804, and a year and a half's Dividends of two Sums of Stock, due respectively on the 10th of October 1804 and 5th of January 1805, which he had retained for the use of his Wife, as Tenant for Life under the Will.

Mr. *Horne*, and Mr. *Boteler*, for the Plaintiffs *J. B. Hollingworth*, and *Lydia* his Wife, late *Lydia Amphlett*, the present Tenant for Life, said that, after the decisions in *Angerstein v. Martin* (f), and *Hewitt v. Morris* (g), it could not be contended that Mrs. *Parke* was not entitled to the first year's Income of what ultimately proved to be the residue of the Testatrix's property; but that she could not be entitled to more, either upon principle or the expressions of the Will; for that the Trustees were directed to pay her the Interest only of the residue.

Mr. *Hart*, and Mr. *Garratt*, for the Defendant *Parke*.

The VICE-CHANCELLOR:—

The Testatrix, *Martha Clay*, after devising her Freehold and Copyhold Estates to Trustees for Sale, uses the

(f) 1 Turn. & Russ. 232. (g) Ibid. 241.

following expression : " I will and direct that the Monies to arise from such Sale be considered and taken as part of my Personal Estate :" and, in a subsequent part of the Will, she uses the following words : " And I do hereby will and direct that, out of the Monies to arise by such Sale, and out of all *other* my Personal Estate, the several Legacies hereinafter mentioned be paid and satisfied." And the Residuary Clause in her Will begins in the following manner : " And all the residue of my Personal Estate, and of the Monies arising from the Sale of my Real Estates, I give and bequeath," &c. &c.

Upon the particular language of the Will in the passages to which I have referred, there arises this question : Whether the Testatrix is to be considered as having intended that the Monies arising from the Sale of the real Estates, should have the same qualities as if, at her death, they had been part of her Personal Estate ; or whether she intended that those Monies, for the purposes of her Will only, should form a common Fund with her Personal Estate ?

The two first passages do, indeed, purport an intention that those Monies should be considered as if Personal Estate at her death ; but the latter passage points the other way : and, it is only from deference to the two Cases of *Durour v. Motteux*, and *Mallabar v. Mallabar*, that I arrive at the conclusion in this Case that this Testatrix had in her view the improbable intention that the Monies arising from the Sale of her Real Estate should, for purposes not foreseen by her, have the same qualities as if, at her death, they had been part of her Personal Estate.

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AMPHLETT
v.
PARKE.

Mallabar v. Mallabar
in 1827 3 June 542
a decision which ought
not to be followed.
Durour v. Motteux
in 1827 5 July 37
15 X 17292
29 Oct 2 M 1827
Regd K. 662

1827.

AMPHLETT
v.
PARKER.

There is another question arising from the circumstance that the pecuniary Legacies were not paid until the end of a year after the Testatrix's death; and that the Funds, with which those Legacies were paid, did, in the mean time, produce Interest or Dividend.

The residuary Estate is given for Life, with remainders over to the Children of the Tenant for Life: and the Tenant for Life claims this Interest or Dividend as belonging solely to her. The Testatrix, clearly, had not this intention. Her plain meaning was, that the Tenant for Life should enjoy the Income of that Property, the Capital of which was to descend to her Children; and nothing more: and the Interest or Dividend in question is, therefore, to be considered as Capital, of which the Tenant for Life will take the Income only.

17th & 20th
March,
& 27th April.

Tithes.

An Exemption from Tithes was claimed, as to certain Copyholds, on the ground of Unity of Possession of the Rectory, Manor and Lands in one of the greater Monasteries dissolved by 31st H. 8. Other Copyholds of the Manor had belonged to the Monastery at the Dissolution, and were subject to Tithe. Held, nevertheless, that the Exemption was good, because the Monastery might have granted out the latter Copyholds before the union of the Rectory, and the former after it.

MONCK v. HUSKISSON.

THE Plaintiff agreed to sell to the Defendants certain Freehold and Copyhold Lands, situate within the parish and manor of *Barking*, in *Essex*. The Freeholds and part of the Copyholds were alleged, in the Agreement, to be exempt from the Tithes of Corn and Hay. The ground of the exemption was the unity of

1828 May 529. 294 v. 513.
1st Baroness 1st Turner 33 1/2 a. 526

possession of the Manor, Rectory and Lands in the Abbess and Convent of *Barking*, which was one of the greater Monasteries, and was dissolved by 31st H. 8, c. 13. However, in the account, contained in Domesday, of the possessions of the Abbey, the Rectory was not mentioned. But in the Grant of it, made by Edward 6th, it was expressed to have been Parcel of the Possessions of the Monastery: and the Lands, alleged to be exempt, were proved not to have paid Tithes within living memory.

Upon the hearing of an exception taken by the Defendants to the *Master's Report* which was in favour of the exemption,

The *Attorney-General*, Mr. *Roupell*, and Mr. *Pemberton*, for the Defendants, said that the Rectory, not being mentioned in Domesday, it was to be presumed that it did not belong to the Monastery: That, if the exemption really existed, the reason alleged for it could not be the true one; because the exemption extended to the Tithes of Corn and Hay only, and not to all Tithes; because part of the Lands, said to be exempt, were Copyhold, which they could not have been if they had belonged to the Abbess and Convent, who were seised of the Manor; and because part of the Copyholds, though alleged to have belonged to the Monastery, were admitted to be subject to Tithes.

Mr. *Sugden* and Mr. *Preston* for the Plaintiff, said that, as it appeared, by the Grant, that the Rectory belonged to the Abbey at the Dissolution, the omission in Domesday must have been a mistake: but that unity

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T.
HUSKISSON.

of Possession was not necessary to support the exemption, because a spiritual person might prescribe *in non decimando*. *Nash v. Molins* (a) : That the circumstance of the exemption being partial, might be accounted for by the Vicarage being endowed with all the Tithes, except those of Corn and Hay : and that, as to part of the Copyholds being subject to Tithes, the Abbess and Convent might take Tithes from some of their Copy-holders, but not from others : and they cited the *Archbishop of Canterbury's* Case (b), and *Crouch v. Frier* (c).

The VICE-CHANCELLOR :—

This is a Bill, filed by the Vendors, for a specific performance of a Contract for the sale of Lands. Upon a reference to the *Master*, he has found a good title in the Vendors. The contract of sale states that certain Freehold Lands in *Barking*, and thirteen acres of Copyhold Lands, held of the manor of *Barking*, included in the sale, are free from the Tithe of Corn and Hay : and, amongst other exceptions taken to the *Master's* finding, is one as to this question of Tithe.

The discharge from Tithe is claimed upon the ground of the union of the Freehold Lands, and of the Manor of *Barking*, and of the Rectory of *Barking*, in the hands of the Abbess of *Barking*, beyond time of memory, and up to the Dissolution. With respect to the Freehold Lands, there is no difficulty, it being clear that the union of the Rectory with the Title to the Freehold Lands, before time of memory, will, where the Abbey, as in

(a) *Cro. Eliz.* 206.

(b) *2 Rep.* 48.

(c) *Cro. Eliz.* 784, S. C.; *Yelv.* 2; *Moor*, 618; and *Gwill.* 218.

this case, was dissolved by the 31st Hen. 8, continue the discharge of Tithes to the grantee of the Crown. But, inasmuch as the contract includes other Copyhold Land, held of the manor of *Barking*, which is admitted not to be Tithe-free, a difficulty occurred to me how it could be made out, in point of Law, that, upon the head of union, some Copyholds could be Tithe-free, and others subject to Tithe.

If the Copyholds in the manor existed before the union, they then paid Tithe to the Rector, and would continue to pay Tithe to the Abbess, after the union. If the Copyholds were created pending the union, then they might not pay Tithe, and would now be exempt. The counsel for the Plaintiff say that it is to be considered that the Copyholds which do not pay Tithe, were the demesne lands of the Abbess, and in her occupation, and, for that reason, might not pay Tithe, although all the other Copyholds did pay Tithes. But upon that hypothesis, *prima facie*, this difficulty arises, that, if these lands not titheable were the demesne lands of the Abbey and in the occupation of the Abbess, then, inasmuch as no Copyhold could be legally created within time of memory, and as the dissolution of the Abbey was within time of memory, these lands could not now be legal Copyholds. Feeling this difficulty, I desired this point to stand for a second Argument, in order that the Counsel for the Plaintiff might have the opportunity to look for Authorities upon the subject.

The first Case cited in the second Argument was the Case of the Archbishop of *Canterbury*. A religious house, in *Maidstone*, had divers lands there, and were also appropriators of the Rectory. After the dissolution, the Crown granted the Lands to one, and the Rectory, to

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v.

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MOWCK
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another ; the question was whether these Lands were discharged of Tithes. The Court held the Lands were not discharged, because the dissolution of the religious house was not affected by 31st Hen. 8. But the Court declared that, if the dissolution had taken place under the 31st Hen. 8, and there had been an union of the Lands and the Rectory in the religious house beyond the time of memory, the Lands would have continued exempt from Tithes after the dissolution. This Case, therefore, only establishes the acknowledged principle that, where before time of memory there was an union of the title to receive the Tithe and of the title to pay the Tithe, and the religious house was dissolved by 31st Hen. 8, the exemption from Tithes will continue. It is upon this principle, in the present Case, that the Defendants do not dispute the exemption from Tithes as to the Freehold Lands ; but this Case does not touch the difficulty as to the Copyholds.

The other Case relied upon by the Plaintiff is that of *Crouch v. Frier*. In prohibition the surmise was that the Bishop of *Winchester* was seized in Fee of the Manor of *Bishop's Waltham*, and that he and his predecessors, before time of memory, and all his Farmers and Copyholders had been discharged of Tithes. This prescription was held to be good, because it shall be intended that the prescription had its commencement when all the Manor was in the Lord's hands ; and the Lord, being a Spiritual person, was capable of Tithes, and his Farmers and Copyholders stand in his place. This Case has nothing to do with the principle of unity ; for the Bishop was not Rector. He claimed against the Rector ; and the only principle established by this Case, is that a Copyholder, holding

under a Spiritual Lord of a Manor, may prescribe for a discharge from Tithes in right of the Lord.

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There being, therefore, no authority which is expressly in point, the Case remains to be considered upon principle alone: and it has occurred to me that there might be a way in which it is possible that there may have been a legal origin to the exemption claimed for the particular Copyhold, although the other Copyholds pay Tithes.

The union between the Manor and the Rectory, to be good, must have taken place before time of memory; but yet, before the union, the Abbess might have granted out all the Copyholds, except what she then retained as demesne lands; and the Copyholders, thus created, would, of course, pay Tithes to the Rector before the union. But the Demesne Lands might not then pay Tithes to the Rector, because the Abbess, being a Spiritual Person, was herself capable of Tithes. After the union, the Abbess might still, before time of memory, have alienated these thirteen acres, then part of her demesnes, by copy of Court Roll, free from Tithe, as she held them; and, in such case, these thirteen acres would, at this day, continue legally discharged of Tithe, although the other Copyholds paid Tithes. There being this mode by which the exemption claimed might have had a legal origin, I think myself bound to affirm the title as to these Tithes.

1827. May 1529. - P.
1827. C. 20
10 June 70

1827.
30th April.
Will—Power—Construction.

A Feme Co-verte having power to dispose by Will of Personal Property, and of a Real Estate at *N.*, by her Will, after reciting the Power, gave several Pecuniary Legacies, and then gave to her Husband her Fields and House at *N.*, likewise the remainder of her Personality, and all she might die possessed of, after payment of her Debts, Legacies, and Funeral and Testamentary Expenses: Held that the Husband took a Life Estate only in the realty, notwithstanding the gift to him of all the Testatrix might die possessed of.

ARABELLA HUGHES, Widow, by the Settlement on her Marriage with the Defendant *Peter Mawdsley*, conveyed a Messuage and other Hereditaments, in *Great Neston*, to *Archibald Keightley*, his Heirs and Assigns, and assigned to him his Heirs, Executors, Administrators and Assigns, certain Leasehold Premises, and all her Bonds and other Securities for Money, and all her Household Goods, Plate, Linen, China and Furniture and other Personal Estate and Effects in Trust, after the Marriage, as to the Household Goods, Plate, Linen, China and Furniture, for the sole and separate use and disposal of *Mrs. Hughes* during her life, and, after her decease and in default of such disposal, in trust for her next of kin, as if she had died a *feme sole* and intestate: and, as to the Messuages and Premises in *Great Neston*, to the use of *Archibald Keightley* and his Heirs, during *Mrs. Hughes's* life: and, as to the Messuage and Premises in *Little Neston*, upon Trust that *Archibald Keightley*, his Executors and Administrators, should pay the Rents to *Mrs. Hughes* for her separate use: and, as to the Messuages and Premises in *Great Neston*, after the decease of *Mrs. Hughes*, to the use of such Person and Persons, and for such Estate and Estates, as *Mrs. Hughes*, by her will to be signed, sealed and published in the presence of two or more credible witnesses, should appoint, and, in default of such appointment, to the use of *Archibald Keightley*, his Heirs and Assigns, upon Trust to sell, and to divide the proceeds equally amongst the Children of *Mrs. Hughes*, at the usual periods, and, in default of Children, to distribute the same amongst her next of kin.

Mrs. *Mawdsley* made her Will which was executed as required by the Settlement, and was as follows :

“ *I Arabella Mawdsley*, Wife of *Peter Mawdsley*, do make this my last Will and Testament in manner and form following, having full disposing Power by Settlement, made at my Marriage with the above *Peter Mawdsley*, now in the hands of Mr. *Archibald Keightley*, sen., Solicitor, *Liverpool*, and my Trustee.” (The Testatrix here gave several pecuniary Legacies, and then proceeded thus :—) “ I give, devise and bequeath, to my Husband *Peter Mawdsley*, my two Fields and House in the Township of *Great Neston*, likewise the remainder of my Personality, and all I may die possessed of at the time of my death, after the above Bequests are fully discharged, my just Debts paid, Funeral Expenses, and Proving this my last Will and Testament. I nominate and appoint Mr. *Archibald Keightley*, and my Husband, *Peter Mawdsley*, Trustees and Executors of this my last Will and Testament.”

Mrs. *Mawdsley* died on the 24th May 1824, leaving the Plaintiffs, her Sisters and only next of Kin.

The Bill alleged that *Peter Mawdsley* claimed to be entitled, in Equity, to the Fee-simple of the Messuage, Lands and Premises devised to him by the Will ; whereas the Plaintiffs submitted that he was only entitled to a Life Estate therein, and that they, as the next of Kin of the Testatrix, were entitled to have the House, Land and Premises sold, subject to the Life Estate of *Peter Mawdsley* therein, and to have the Proceeds distributed between them, according to the directions contained in the Settlement. And it prayed that

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MONK
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the Defendant *Archibald Keightley*, might be decreed to sell the Reversion of the Messuage, Land and Premises, and to distribute the Proceeds between the Plaintiffs, according to the directions of Settlement.

To this Bill the Defendant *Peter Mawdsley* put in a general Demurrer.

Mr. Preston and Mr. Koe, in support of the Demurrer, cited *Hopewell v. Ackland* (a), *Smith v. Coffin* (b), *Cooke v. Farrand* (c), *Barnes v. Patch* (d), *Doe v. Gilbert* (e), *Huxstep v. Brooman* (f), *Goodtitle v. Maddern* (g), *Beachcroft v. Beachcroft* (h), *Pitman v. Stevens* (i), *Hogan v. Jackson* (k), *Ridout v. Pain* (l).

Mr. Sugden and Mr. Spence, in support of the Bill, cited *Doe v. Rout* (m), *Timewell v. Perkins* (n), and *Roe v. Yeud* (o).

The VICE-CHANCELLOR:—

The Testatrix in this Case was a *Feme Coverte*, who, by Settlement made previous to her Marriage, had Power to dispose, by Will, of Fee-simple Estate, of Leasehold Estate, and of Bonds and Securities for Money, and Household Goods and Furniture, Plate, Linen, China and other Personal Estate. Her Will, which was executed as required by the Power, commenced in the words following:—“ *I A. Mawdsley,*

(a) 1 Salk. 239.	(b) 2 H. Black. 444.	(c) 7 Taunt. 122.
(d) 8 Ves. 604.	(e) 3 Brod. & Bing. 85.	(f) 1 Bro. C. C. 437.
(g) 4 East, 496.	(h) 2 Vern. 690.	(i) 15 East, 505.
(k) Cwsp. 299.	(l) 3 Atk. 486.	(m) 7 Taunt. 79.
(n) 2 Atk. 102.	(o) 2 New Rep. 214.	

wife of *Peter Mawdsley*, do make this my last Will and Testament in manner and form following, having full disposing Power by Settlement made at my Marriage with the above *Peter Mawdsley*, and now in the hands of Mr. *Archibald Keightley*, Solicitor, *Liverpool*, and my Trustee." And, after giving several Pecuniary Legacies, continued thus:—" I give, bequeath and devise, to my Husband, my two Fields and House in *Great Neston*," (being the Estate of which she had Power to dispose,) likewise the remainder of my Personality, and all I may die possessed of at the time of my death, after the above Bequests are fully discharged, and my just Debts, Funeral Expenses, and proving this my last Will and Testament." And she appointed her said Husband and another Person her Executors. The question in the Cause was, whether the Fee in the two Fields and House in *Great Neston*, passed to the Husband by force of the expression: "and all I may die possessed of at the time of my death."

Many Cases have been cited on the subject (and the Question is one of great nicety), in all which Cases the words, in their ordinary signification, would include real Estate.

It is first argued, against the Husband, that, in the disposition made by the expression: " All I may die possessed of at the time of my death," there is no reference to the power under which the Will is made, and that, if these Words would give a Fee, where a Testator devises Property of which he is the Owner, they will not have that effect here. I do not concur in that argument. The introductory words in the Will purport that the Will is made only by force of the power, and

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MONK
v.
MAWDSLEY.

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v.
MAWDSLEY.

every Clause in the Will is, therefore, to be referred to the power. The argument for the Husband is, that these words will have no effect unless they operate to carry the Fee of the *Neston* Estate, the whole personal Estate passing by the prior expression. But I know of no Case in which words have been held to carry a Fee Simple, because they would, otherwise, be mere surplusage and repetition. In all the Cases cited, either the words do, in their ordinary signification, include real Estate: as in *Hopewell v. Acland*, "Whatever else I have not disposed of:" In *Smith v. Coffin*: "The rest and residue of my Goods, Chattels, Rights, Credits, personal and testamentary Estates:" In *Hurstep v. Brooman*: "All I am worth:" In *Beachcroft v. Beachcroft*: "My Wife to have one Moiety after my Debts paid." In all which Cases the words, in their ordinary signification, would include real Estate: or if the words used do not, in their ordinary signification, include real Estate, the Testator has shewn that he meant to apply them to real Estate: as in *Hogan v. Jackson*, where the expression is: "The residue of my Effects, both real and personal, which I shall die possessed of." In their ordinary sense, the words "possessed of," would not import real Estate; but the Testator there expressly applies them to real Estate. In the present Case, there is nothing to show that the Testatrix meant to use the word "possessed" in any other than its ordinary sense; and, on the contrary, the expression "at the time of my death," imports that she had personal Estate alone in her contemplation; for those words would have no sense as applied to real Estate.

My conclusion is, according to the principle of the Decision in *Doe v. Rout*, that the words in question

might have been sufficient to pass real Estate, if, from other parts of the Will, such had appeared to have been the intention of the Testatrix; but that no such intention does sufficiently appear in any part of the Will. The words are to be considered, therefore, as loose and general words, and mere surplusage, which do not add to the sense of the Will.

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MONK

v.

MAWDSLEY.

CHILLINGWORTH *v.* CHILLINGWORTH.

25th April.

THE Purchaser of an Estate under a Decree moved for and obtained the Order *Nisi*, and served it upon the Vendor. The Purchaser having afterwards neglected to confirm the Order, the Vendor now made that Motion. It was objected that the Vendor ought not to confirm the Purchaser's Order, but to obtain a new Order *Nisi*. The Vice-Chancellor was of a different opinion, and made the Order prayed.

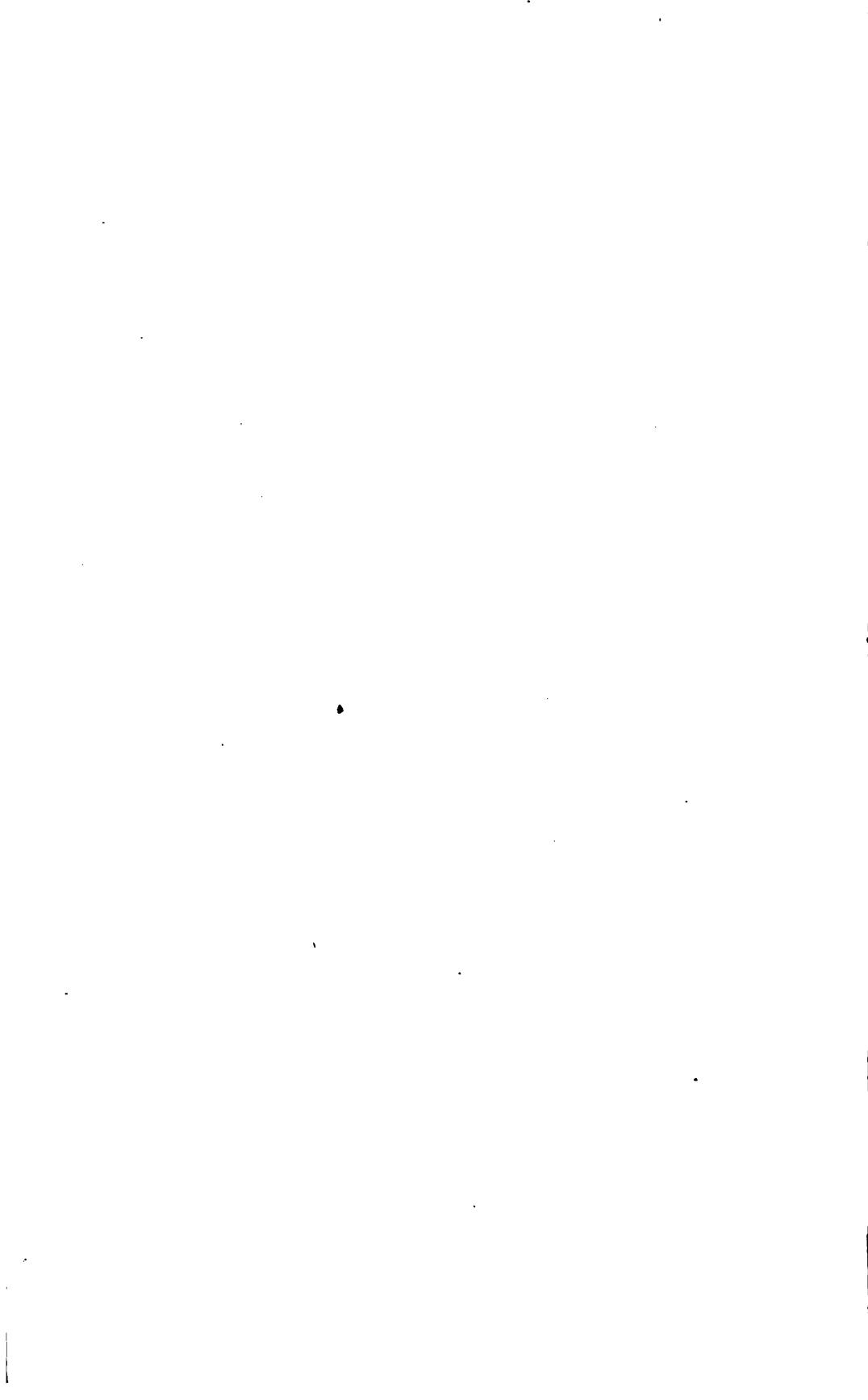
Practice.
Vendor
and
Purchaser.

The Vendor
may confirm an
Order *Nisi* ob-
tained by the
Purchaser, if the
latter neglect to
do so.

5. Decr. 37.

Robertson v. Fletcher
w. Decr. 197

END OF PART II.



CASES IN CHANCERY

BEFORE THE
VICE-CHANCELLOR.

MEMORANDUM.

ON the 30th of April, the Earl of *Eldon* resigned the Great Seal, which, on the same day, was delivered by His Majesty to the Right Honourable Sir *J. S. Copley*, Knight, who was created a Peer of the United Kingdom, by the title of Baron *Lyndhurst* of *Lyndhurst*, in the County of *Southampton*.

On the 3d of May, the Right Honourable Sir *John Leach*, Vice-Chancellor of *England*, was appointed Master of the Rolls, in the place of Sir *J. S. Copley*.

On the following day, *Anthony Hart*, Esquire, one of His Majesty's Counsel, was appointed Vice-Chancellor in the place of Sir *John Leach*, and received the honour of Knighthood, and was afterwards sworn in a Member of His Majesty's Most Honourable Privy Council.

Sir *C. Wetherell*, Knight, His Majesty's Attorney-General, resigned that office, and, on the 27th of April, was succeeded by *James Scarlett*, Esquire, one of His Majesty's Counsel, who also received the honour of Knighthood.

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5th May.

*Injunction.
Debtor and
Creditor.*

The Wife of a Bankrupt, having separate Property, died in *France*, in possession of other Property there, which was claimed by the Creditors as belonging to the Husband. She, by Will, disposed of all her separate Estate, except 1,500*l.* Consols (which, in default of Appointment, was held in trust for her Executors or Administrators), and appointed a Lady, resident in *France*, her Executrix.

Injunction granted, at the suit of the Assignees, to restrain the Transfer of the Consols; but refused as to the rest of the separate Estate.

STEAD v. CLAY.

THE Plaintiff was the Assignee of one *Liddard*, a Bankrupt, under a Commission issued on the 26th of June 1823. The Defendant, Mrs. *Clay* (who was resident in *France*) was the Executrix and Residuary Legatee of the Bankrupt's late Wife, who died in *Paris* in January 1825, having considerable separate Property, the whole of which she disposed of, except 1,500*l.* Three per Cent. Consols, standing in the names of the Defendants, her Trustees, and which, in default of appointment, was held in trust for Mrs. *Liddard*'s Executors or Administrators: *Liddard*, therefore, upon his Wife's decease, became entitled to it in his marital right.

In 1822 *Liddard* sold his Household Goods and Furniture, invested the proceeds, together with other Monies, in the *French Funds*, and shortly afterwards went, with his Wife, to reside in *Paris*. After the issuing of the Commission, he returned to this Country, and died, after his Wife.

The Bill alleged that *Liddard*, before he went to reside in *Paris*, had committed an act of Bankruptcy: that he absconded thither to avoid his Creditors: that he remitted the proceeds of his Furniture, and other Monies, to *Paris*, and procured them to be invested in the *French Funds*, in his Wife's name, in order to defraud his Creditors: that Mrs. *Clay*, as the Executrix of Mrs. *Liddard*, had possessed herself of that Stock, and also of some Furniture and other Articles which the Bankrupt had left in his late Wife's possession on

his returning to this Country: and that, as Mrs. *Clay* resided in *France*, the Plaintiff would be unable to recover them from her. The Bill prayed either that the Stock in the *French Funds*, and the other Property of the Bankrupt in *France*, might be delivered to the Plaintiff, or that the Value thereof might be paid to him out of the Testatrix's Estate: that that Estate might be secured, and a Receiver of it appointed: and that the Defendants, the Trustees, might be restrained from transferring any part of the Testatrix's separate Property.

The Answers of Mrs. *Clay* and the Trustees denied having any knowledge of *Liddard's* having committed an act of Bankruptcy, or done any of the other acts complained of with a view to defraud his Creditors. Mrs. *Clay*, however, admitted that the Testatrix, shortly before her death, had transferred a sum of *French Stock* into the names of her, Mrs. *Clay*, and another person, as Trustees: and it did not appear how the Testatrix had become possessed of this Stock.

Mr. Sugden, Mr. Rose, and Mr. Knight, now moved for an Injunction, according to the Prayer of the Bill.

Mr. Shadwell, and Mr. Ching, appeared for the Defendants, and opposed the Motion.

The *Vice-Chancellor* (*a*) granted the Motion as to the 1,500*l.* Consols; but refused it as to the other Sums of Stock (*b*).

(*a*) Sir *Anthony Hart*.

(*b*) The Bill was afterwards amended: and, on the Answer being put in to the Amendments, it appeared that Mrs. *Liddard* had disposed, by her Will, of the 1,500*l.* Consols, as well as of

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v.

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MILLER v. WHEATLEY.

Practice.
Exceptions.

Exceptions to an Answer filed, after the Bill has been amended, will not be taken off the File, if no Answer is required to the Amendments.

THE Plaintiff having changed his Name, by the King's License, the Bill was amended after the Answer had been put in, by substituting the Plaintiff's new Name for his old one, and by adding another Defendant. The Plaintiff then excepted to the Answer.

Mr. Skirrow, for the Defendant who had answered the Bill, moved that the Exceptions might be taken off the File for irregularity, they having been filed after the Bill was amended.

Mr. Whitmarsh, for the Plaintiff, cited *Taylor v. Wrench* (a), and said that the Amendments were of such a nature that no further Answer could be required.

The Vice-Chancellor ordered the Plaintiff to pay the Costs of the Motion, and that the Exceptions should remain on the File.

the rest of her separate Estate. The Defendant, Mrs. Clay, then moved the Lord Chancellor to discharge the Order made by the Vice-Chancellor; and the Plaintiffs made a Cross-motion to have the Injunction extended to the rest of Mrs. Liddard's separate Property. On the 31st March 1828 his Lordship refused the former Motion, and granted the latter.

(a) 9 Ves. 315.

DAVIDSON v. NAPIER.

1827.
7th May.Partnership.
Solicitor.

THE Plaintiff and one *Dickins* were Partners as Solicitors and Attorneys. *Dickins* became Bankrupt, and his Assignees having excluded the Plaintiff from all interference in the affairs of the Partnership, the Bill was filed, praying to have the affairs of the Partnership wound up, and for an Injunction to restrain the Defendants, the Assignees, from intermeddling with the Partnership Property and Effects.

Mr. *Spence*, for the Plaintiff, now moved that the Books, Papers and Writings of the Partnership, belonging to the Persons who had employed the Plaintiff and *Dickins* as Attorneys and Solicitors, might be delivered to the Plaintiff, upon oath.

The Vice-Chancellor refused the Motion, saying that he had no right to order the Papers of the Clients to be delivered to one of the Partners, without the consent of the Clients.

One of two Solicitors, who were Partners, became Bankrupt; the Assignees excluded the other from interfering with the affairs of the Partnership: the Court, nevertheless, refused to order the Assignees to deliver to him the Papers belonging to the Clients of the Firm.

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8th, 9th & 10th
May, and
29th October.

*Merger of
Charges.
"Partial" Evidence.
p 326.*

MARY ANN ELIZABETH ASTLEY v. THE
HONOURABLE GEORGE JOHN MILLES,
and Others.

RICHARD WARNER, Esquire, by his Will, dated the 10th of December 1750, gave all his Manors, Mes-
suages, Lands, Tenements and Hereditaments in North
*Elmham, Beetley, Gressenhall, Bittering, East Bilney,
Brisley, Sandfield, Horningtoft, Gately and Ryburgh*, in
the County of Norfolk, to *Lee Warner* and *Henry Lee Warner*, for the term of Ninety-nine Years next after
his death, upon Trusts long since satisfied, and, subject
thereunto, to his eldest Daughter, *Mary Milles*, Widow
of *Christopher Milles*, Esquire, for her life, or until her
eldest Son should attain the age of Twenty-four years,
which should first happen; and, after the decease of
Mary Milles, or her eldest Son attaining the age of
Twenty-four years, he gave the same Hereditaments
and Premises to *Richard Milles*, his Grandson, eldest
Son of *Mary* his Daughter, for his life; with remainder
to Trustees to preserve contingent remainders; with
remainders to the first and other Sons of *Richard Milles*
successively in tail male; with remainder to *Christopher Milles*, his Grandson, second Son of his Daughter, for
his life; with remainder to the same Trustees to pre-
serve contingent remainders; with remainders to the
first and other Sons of *Christopher Milles* successively
in tail male; with remainder to *John Milles*, his Grand-
son, third and youngest Son of his Daughter, for his
life; with remainders to his Sons in like manner; with
remainder to the heirs male of the body of *Mary Milles*;
with remainder to his own right Heirs. And, after

reciting that he held, by Lease from the Dean and Chapter of *Norwich*, the Rectory Improper of *North Elmham*, and certain Lands lying dispersedly amongst his Real Estates and Lands in *North Elmham*, and, in like manner, held, by Lease of the said Dean and Chapter of *Norwich*, certain Lands in *Gately* and *Colkirk* aforesaid, the Testator gave the same Rectory and Lands to *Mary Milles* his Daughter, her Executors, Administrators and Assigns, in Trust for the Uses, Estates and Purposes thereinbefore by him declared touching his Real Estates in *North Elmham*, and *Gately*, and *Colkirk*, and that the same might, from time to time, be enjoyed with the other Estates in *North Elmham* and *Gately* aforesaid, with which the same were so intermixed; and that the Person or Persons being in the legal possession of the *North Elmham* and *Gately* Estates should, from time to time, pay the yearly reserved Rents, and renew Leases, and pay and discharge all Fines and Payments incident to the same, the Testator's Will being that the Rectory, Lands and Premises might always, unless hindered by arbitrary impositions, be held and enjoyed according to the Devises and Limitations thereinbefore by him declared touching his Real Estates in *North Elmham* and *Gately*: and he appointed his two Daughters, *Mary Milles* and *Elizabeth Joddrell*, his Executrices.

The Testator died some time after, making his Will, leaving his two Daughters his Co-heirs at Law. *Christopher Milles*, the second Son of *Mary Milles*, died many years since without issue.

By Indentures of Lease and Release, dated the 13th and 14th of December 1773, the Release made between

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Mary Milles and *Richard Milles*, her eldest Son, of the first part; *Stafford Squire Baxter*, of the second part; *John Colman*, of the third part; Sir *Edward Astley*, Bart. *William Codrington*, Esq. and *Edward Milles*, Esq. of the fourth part; and *John Wodehouse*, who afterwards became Lord *Wodehouse*, and *Lewis Cage*, Esq. of the fifth part; and by a Common Recovery suffered as of Hilary Term 14 Geo. 3. all the Manors, Advowsons and other Hereditaments belonging to *Mary Milles* and *Richard Milles*, or either of them, in the county of Norfolk, then late of *Richard Warner*, deceased, or since his decease, purchased by *Mary Milles* and *Richard Milles*, or either of them, were settled on *Richard Milles*, for his Life; with Remainder to Trustees to preserve Contingent Remainders; with Remainders to the first and other Sons of *Richard Milles* successively in tail male; with Remainder to *John Milles*, the younger and only other surviving Son of *Mary Milles*, for his life; with Remainder to Trustees to preserve Contingent Remainders; with Remainders to his first and other Sons successively in tail male; with Remainder to *Mary Milles*, for her Life; with Remainder to Trustees to preserve Contingent Remainders; with Remainder to Lord *Wodehouse* and *Lewis Cage*, for 500 years, to be computed from the death of *Mary Milles*, upon the Trusts therein declared, and, subject thereto, to any one or more of the Daughters of *Richard Milles*, for such Estate Tail and Estates Tail, and in such shares and manner as *Richard Milles* should, by Deed or Will to be executed and attested as therein mentioned, appoint; and, in default thereof, to the use of all the Daughters of *Richard Milles*, equally to be divided between them, as Tenants in common in tail, with Cross-Remainders amongst them in tail, with divers Remainders over, and

with the ultimate Remainder to the right Heirs of *Mary Milles*. The Trusts of the term of 500 years were, that the Trustees should raise, by the usual means, after the death of *Mary Milles*, and after the deceases and failure of issue male of *Richard Milles* and *John Milles*, the sum of 25,000*l.*, and, in the mean time, the Interest of that sum, at 4 per cent. per annum, to be computed from the death of *Mary Milles*, or from the decease of the Survivor of *Richard Milles* or *John Milles*, or from the time of the failure of their issue male, which should last happen, and should pay the 25,000*l.* and the Interest thereof, to such Persons, in such parts, manner and form as *Mary Milles* should by Deed or Will appoint.

By a Deed Poll, dated the 24th of October 1775, *Mary Milles*, by virtue of the power given to her by the last Indentures, directed the Trustees of the term of 500 Years to pay 10,000*l.*, part of the 25,000*l.*, to *Mary Milles*, the younger, the eldest Daughter of the first-named *Mary Milles*, and 5,000*l.*, further part of the 25,000*l.*, to the personal Representatives of *John Milles*; and 10,000*l.*, the remainder of the 25,000*l.*, to *Henry Lee Warner* and the Rev. *John Astley*, upon trust to place out at Interest 5,000*l.*, part of that 10,000*l.*, and to pay one moiety of the 5,000*l.* to *Bernard Astley*, one of the Sons of Sir *Edward Astley* and Dame *Ann Astley*, his Wife, the second and youngest daughter of the first-named *Mary Milles*, when *Bernard Astley* should attain the age of twenty-one years; and to pay the other moiety of the 5,000*l.* to *Richard Astley*, another of the sons of Sir *Edward* and Lady *Astley*, when he should attain the age of twenty-one years, with benefit of Survivorship in case either of

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them should die before he attained his age of twenty-one years; and, in case they should both die before they attained that age, then to pay the last-mentioned sum of 5,000*l.* to *Edward John Astley, Henry Nicholas Astley, and William Coke Astley*, three other Sons of Sir *Edward* and Lady *Astley*, in equal shares, when they should respectively attain the age of twenty-one years, with benefit of Survivorship in case any of them should die under that age; and also to place out at Interest, in like manner, the sum of 5,000*l.*, the remaining part of the last-mentioned 10,000*l.*, and pay, to Lady *Astley*, the Interest and Dividends thereof, during her life; and, after her decease, to pay the last mentioned 5,000*l.* also to *Edward John Astley, Henry Nicholas Astley, and William Coke Astley*, in equal shares, when they should attain the age of twenty-one years, with benefit of Survivorship in case any of them should die before they attained that age; and, in case they should all die before they attained that age, to pay the last-mentioned sum of 5,000*l.* to *Bernard Astley and Richard Astley*, in equal shares, when they should attain their ages of twenty-one years, with benefit of Survivorship as before stated; and, in case *Bernard Astley, Richard Astley, Edward John Astley, Henry Nicholas Astley, and William Coke Astley* should all die before they should attain their respective ages of twenty-one years, to pay the two last-mentioned sums of 5,000*l.*, and 5,000*l.* to Lady *Astley*, her Executors, Administrators and Assigns.

The Leases of the Rectory and Hereditaments, bequeathed by the Will of *Richard Warner*, were, from time to time, during the Life of the first-named *Mary Miles*, renewed in her name.

Mary Milles died in or about the month of October 1781, leaving *Richard Milles*, her eldest Son and Heir Male of her body, her surviving. After her decease, the Leases of the Rectory and Hereditaments were, from time to time, renewed in the name of *Richard Milles*, and, particularly by an Indenture dated the 3d of June 1800, whereby the Dean and Chapter of *Norwich* did, on the surrender of the then existing Lease, demise, unto *Richard Milles*, the Site of the Rectory of *North Elmham*, and certain Lands, Tithes and Hereditaments therein described (being parcel of the Leasehold Hereditaments bequeathed by the Will of *Richard Warner*) to *Richard Milles*, for twenty-one years: and also, by another Indenture, bearing even date with the last Indenture, whereby the Dean and Chapter did, on the surrender of the then existing Lease, demise, to *Richard Milles*, certain Lands and Hereditaments in *Gately* and *Colkirk*, in the County of *Norfolk*, being the remainder of the Leasehold Premises bequeathed as before described, except a Wood in *Gately*, and one Grovite there, and one other Grovite in *Colkirk*; to hold the same, except as therein excepted, unto *Richard Milles* for twenty-one years.

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By an Indenture, dated the 30th of September 1801, and enrolled as the Law requires for Conveyances of Estates sold to purchase or redeem the Land Tax, and made between the Dean and Chapter of the first part, two of the Commissioners for the redemption and sale of the Land Tax of the second part, *Richard Milles* of the third part, and *Thomas Wodehouse*, Esq. of the fourth part, after reciting that the Dean and Chapter being desirous of availing themselves of the Powers which, by certain Acts passed for the redemption and purchase of Land

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Tax, were given to Bodies Corporate and Companies, enabling them to sell a competent part of their Manors, Messuages, Lands, Tenements and Hereditaments, for redeeming or purchasing their Land Tax, had agreed to sell to *Richard Milles* the Site of the Rectory or Parsonage, Lands, Tenements and Hereditaments thereinafter described, for 5,967*l.* 10*s.* 1*d.* (exclusive of 562*l.* 7*s.* 3*d.*, the value of the full grown Timber growing thereon,) and which two sums amounted to the sum of 6,529*l.* 17*s.* 4*d.* and that the Commissioners had agreed to confirm such Contract, and that *Richard Milles* had redeemed the Land Tax of the Estates with his own Money; it was witnessed that, in consideration of 562*l.* 7*s.* 3*d.*, paid by *Richard Milles* to the Dean and Chapter, in discharge of the costs and expenses attending Sales made by the Dean and Chapter for the redemption of their Land Tax; and in consideration of 5,967*l.* 10*s.* 1*d.*, by *Richard Milles*, paid into the Bank of England to be placed to the account of the Commissioners for the redemption of the National Debt, the Dean and Chapter did, in exercise of the powers vested in them by the several Acts therein referred to, convey, and the Commissioners did confirm, unto *Thomas Wodehouse*, and his Heirs, the Site of the Rectory or Parsonage, Lands, Tenements and Hereditaments, comprised in the Leases, and also the Woods, Lands and Hereditaments excepted out of the last-mentioned Lease, upon Trust to convey the same to the uses expressed in the next stated Indentures.

By Indentures of Lease and Release, dated the 1st and 2d of October 1801, the Release made between *Thomas Wodehouse* of the first part, *Richard Milles* of

the second part, the Commissioners of the third part, and *Lewis Thomas Watson* Lord *Sondes* of the fourth part; after reciting that *Milles* was desirous that the immediate Estates and Interests in the Hereditaments and Premises under the subsisting Leases thereof, as well as the Reversions in Fee expectant thereon, and also the Woods, Lands and Hereditaments excepted out of the last-mentioned Lease, but purchased by *Milles* as aforesaid, might be charged with the re-payment to him of the Purchase Money and Interest, and that, subject to such charge, the same Woods, Lands and Hereditaments, as well as the Reversion of the Leasehold Hereditaments, might be conveyed in manner after-mentioned; it was witnessed that, in pursuance of the directions contained in the Acts therein mentioned for the redemption and sale of the Land Tax, *Thomas Wodehouse* conveyed, to Lord *Sondes* and his Heirs, the Rectory and Parsonage and other Hereditaments comprised in the last Indenture, to the use of Lord *Sondes*, his Executors, Administrators and Assigns, for 1,000 years, and, subject thereto, to and for such of the uses, trusts and purposes expressed in the Will of *Richard Warner*, concerning his Freehold Estates thereby devised to his Daughter *Mary Milles* with such Remainder over as aforesaid, and which precede the Limitations to the Heirs Male of her body, as were then capable of taking effect; and, after the determination of the said several Lives and Estates then subsisting, which preceded the Limitation to the Heirs Male of the body of *Mary Milles*, then to the use of the Heirs Male of the body of *Mary Milles*, and, for default of such issue, to the use of the right Heirs of *Richard Warner* for ever, subject to a proviso for cesser of the term of 1,000 years, in case the Person or

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Persons who should, for the time being, be entitled to the Premises subject to that term, should pay to *Richard Milles*, his Executors, Administrators and Assigns, the Sum of 6,529*l.* 17*s.* 4*d.*, with Interest, on the 2d of April then next: provided that the Persons who should, from time to time, be entitled to the Rents of the Hereditaments thereby released, subject to the term of 1,000 years, should be charged with the Payment of the Interest of 6,529*l.* 17*s.* 4*d.* which should accrue during his Estate in the same Hereditaments, and that no greater arrear than one year should be recoverable against any Person who should become entitled in remainder, for Interest accrued during the Estate or Term of any person entitled to any preceding Estate in the Premises; and that *Richard Milles*, his Executors and Administrators, should, from thenceforth, stand possessed of the Premises, demised to him by the two Leases of the 3d of June 1800, in the first place, as a security to him for the payment of the 6,529*l.* 17*s.* 4*d.* and Interest, and, subject thereto, upon and for such trusts and purposes as the same Premises were then liable to in manner before mentioned.

The Act of Parliament by virtue of which the Commissioners were made directing Parties to the last-mentioned Indenture, was the 39th Geo. 3. c. 108; by the 8th section of which it is enacted that, where the Revision of any Manors, Messuages, Lands, Tenements or other Hereditaments, holden under any Body Politic or Corporate, or Company, as therein mentioned, by virtue of any Lease for one or more Life or Lives, or for years absolute or determinable on the dropping of one or more Life or Lives, or by copy of Court Roll, or Customary Tenure for Life or Lives, should be pur-

chased under the powers of the same Act, or of any Acts therein mentioned, by or with the Money of the Persons for the time being beneficially entitled to the Rents and Profits thereof; and where such Lease or Leases should be subject to any Will or Settlement, so that such Person should not, at the time of purchasing the Reversion thereof, be entitled to the absolute Interest under such Lease or Leases, then the Reversion should be settled, under the direction of the Commissioners appointed as therein mentioned, in such manner as that the amount of the Money paid for purchase thereof, with lawful Interest, might be a charge on such Reversion for the benefit of the Persons advancing the same, their Executors, Administrators or Assigns; and that, subject thereto, the Fee-simple of such Manors, Messuages, Lands, Tenements or other Hereditaments, should be settled, under the like direction, for the benefit of the Persons so purchasing the same, and of such other Persons as would have been entitled, under such Will or Settlement, to the benefit of any renewed Lease or Leases for the time being, and so as to be enjoyed by them for such respective Estates and Interests as, considering the alteration of the Tenure, should appear to the Commissioners most correspondent with the intention of such Will or Settlement: provided that it should be lawful for the Commissioners to direct an application to be made to the Court of Chancery, in a summary way, for obtaining direction as to the mode of settling any such Reversion, where the case should appear to them to be attended with difficulty.

By an Indenture, dated the 21st of June 1808, indorsed upon the before-stated Deed Poll, and made between *Mary Miller*, Daughter of the first-named

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Mary Milles, of the first part, *Richard Milles*, of the second part, and *William Deedes*, Esquire, of the third part, after stating that the first-named *Mary Milles* had departed this life, and that *Mary Milles*, Party thereto, would, under the appointment contained in the Deed Poll, become entitled, after the deceases of *Richard Milles* and *John Milles*, and after failure of Issue Male of their respective bodies, to the principal Sum of 10,000*l.* to be raised as therein mentioned, with Interest at four per cent. per annum, to be computed from the decease of the Survivor of *Richard Milles* and *John Milles*, or from the time of the failure of such Issue Male, and that *Mary Milles*, Party thereto, had agreed, with *Richard Milles*, for the Sale to him of her Interest in the 10,000*l.* and all Interest to accrue thereon, for the Sum of 5,250*l.* and that *Richard Milles* was desirous that the same should be assigned to *Deedes* upon the Trusts thereafter expressed, *Mary Milles* assigned to *Deedes* the said Sum of 10,000*l.*, together with all Interest that should accrue thereon, upon Trust to dispose of the same unto such Persons, in such Shares as *Richard Milles* should, by any Deed under his Hand and Seal, to be attested by two or more credible Witnesses, or by his Will, attested in like manner, direct; and, in default thereof, in Trust for *Richard Milles*, his Executors, Administrators and Assigns.

John Milles, in or about the month of October 1810, sold to *Richard Milles* the 5,000*l.* by the Deed Poll appointed, by the first-named *Mary Milles*, to be paid to the Executors, Administrators and Assigns of him, *John Milles*, in the events before mentioned, together with all Interest that should accrue thereon, for 3,333*l.* and the same was assigned by *John Milles* to *William*

Deedes, in Trust for *Richard Milles*, by an Indenture dated the 12th of October 1810, indorsed upon the Deed Poll, similar, in point of form, to the last-stated Indenture.

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William Coke Astley died under age, leaving *Henry Nicholas Astley* and *Edward John Astley* him surviving, who both lived to attain the age of twenty-one years.

In January 1817, *Henry Nicholas Astley* sold, to *Richard Milles*, the 2,500*l.* (to which he was entitled, in the events before mentioned, under the appointment made by the first-named *Mary Milles* by the Deed Poll,) together with all Interest that should accrue thereon, for 1,992*l.* 10*s.*; and the same was assigned, by *Henry Nicholas Astley*, to *William Deedes*, in Trust for *Richard Milles*, by an Indenture dated the 28th of January 1817, indorsed upon the Deed Poll, and similar, in all respects, to the two last Indentures.

Neither *Richard Milles* nor *John Milles* had any Issue Male. *Richard Milles* had Issue one Daughter only, *Mary Elizabeth Milles*; who, in November 1785, intermarried with *Lewis Thomas Lord Sondes*, since deceased, by whom she had issue four Sons and two Daughters. *Lady Sondes* died, in September 1818, leaving *Lewis Richard Lord Sondes* her eldest Son and Heir-at-Law, and Heir of her body. *John Milles* died previously to the execution of the next-mentioned Indentures.

By Indentures of Lease and Release, dated the 24th and 25th of November 1818, the Release made between *Richard Milles*, of the first part, *Lewis Richard Lord*

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Sondes, of the second part, *Thomas Atkinson*, Gent., of the third part, and *Thomas Starr*, Gent., of the fourth part, after reciting that, by Indentures of Lease and Release of the 13th and 14th of December 1773, and by a common Recovery suffered in pursuance of an Agreement contained in the said Indenture of Release, and a declaration of the Uses of that Recovery contained in the same Indenture, and by reason of the determination or failure of divers Estates, Uses and Interests limited or created by the same Indenture, the Manors, Messuages, Advowsons, Farms, Lands, Tenements and Hereditaments thereinbefore mentioned to be comprised in the same Indentures of Lease and Release and Recovery, then stood limited to the use of *Richard Milles* and his Assigns, for life, with Remainder to the use of his first and other Sons, successively, according to the priority of their births, in tail male; with Remainder to *John Wodehouse* and *Lewis Cage*, for 500 years, upon certain Trusts declared of the same term, being Trusts for raising, after the deceases of *Mary Milles*, *Richard Milles*, and *John Milles*, (who was then since dead without Issue), and after failure of issue male of *Richard Milles* and *John Milles*, the sum of 25,000*l.* to be paid to such Persons, at such times, and in such shares, manner and form as *Mary Milles* should, by Deed or Will, to be by her sealed and delivered in the presence of two or more credible Witnesses, direct or appoint, being a sum of 25,000*l.* of which an appointment was made by *Mary Milles*, by a Deed Poll, dated the 24th of October 1775; with Remainder to *Lewis Richard Lord Sondes* in tail, as being the eldest Son of *Mary Elizabeth Milles*, afterwards the Wife of *Lewis Thomas Lord Sondes*, and who was the only Daughter of *Richard Milles*; with divers Remainders

over; and, after reciting that there was no Issue Male of *Richard Milles*, nor any probability of any Issue Male of him, and that *Richard Milles* agreed to purchase, of *Lewis Richard Lord Sondes*, the benefit of the Remainder in Tail of Lord *Sondes* in the Manors and other Hereditaments, and that the Price to be paid for the same Remainder in Tail, or reversionary Interest, and of a Recovery to be suffered to bar the same Entail and the Remainders expectant thereon, was 42,000*l.*: it was witnessed that, in consideration of 42,000*l.* to *Lewis Richard Lord Sondes*, paid by *Richard Milles*, for the purchase of the Estate and Interest of *Lewis Richard Lord Sondes* in the Manor, Messuages and other Hereditaments thereafter released, *Richard Milles* conveyed, and Lord *Sondes* conveyed and confirmed to *Thomas Atkinson*, his Heirs and Assigns, the aforesaid Manor, Advowson and Hereditaments, to the intent that a Common Recovery might be suffered thereof, which should enure to confirm all Estates and Interests which were limited, by the thereinbefore recited Indentures of Lease and Release, prior to the Estate Tail then or then lately vested in *Lewis Richard Lord Sondes*, and to all Powers annexed or collateral to the same Estates and Interests, and to all Estates, Interests and Charges which had been created by virtue of the same Powers, and were then subsisting; and, subject thereto, to the use of *Richard Milles*, his Heirs and Assigns for ever. A Common Recovery was accordingly suffered as of Michaelmas Term, 59th Geo. 3.

Richard Milles, by his Will dated the 2d of December 1818, gave all his Manors, Farms, Tenements and Hereditaments, in *North Elmham*, *Gately*, *Colkirk*, *Beetley* and *Stanfield*, and elsewhere, in the County of

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Norfolk, and also the Site of the Rectory and Parsonage, and the Advowson to the Vicarage or Church of *Elmham*, subject, as to the said Manors and Estates, to such Charges and Incumbrances as might be charged thereon at the time of his decease, to the Honourable *George Watson*, senior, and Sir *Henry Oxenden*, Bart. for 500 years from his decease, and, subject thereto, to the use of his Grandson, the Honourable *George John Watson*, during his life, with Remainder to Trustees to preserve contingent Remainders; with Remainder to the first and other Sons of his said Grandson, successively, in Tail Male; with Remainder to the use of the Testator's Grandson, the Honourable *Henry Watson*, during his life, with Remainders to Trustees to preserve contingent Remainders; with Remainder to the use of the first and other Sons of his last-named Grandson, in tail-male; with Remainder to the Testator's Grandson, the Honourable *Richard Watson*, during his life; with Remainder to the same Trustees to preserve contingent Remainders; with Remainder to the first and other Sons of *Richard Watson*, in tail-male; with Remainder to the second and every other Son, other than an eldest Son, of his Granddaughter, *Mary Grace Lady Palmer*, for life; with Remainder to the same Trustees to preserve contingent Remainders; with Remainder to the first and every other Son of such second and every other Son, other than a first and eldest Son as aforesaid, successively, in tail-male; and, in default of such Issue, to the use of his, the Testator's, Grand-daughter, the Honourable *Catharine Watson*, for her life; with Remainder to the same Trustees to preserve contingent Remainders; with Remainder to the second and every other Son, other than and except a first and eldest Son, of the body of his Granddaughter *Catharine*, successively, in tail-male; with

Remainder to his, the Testator's, Nephew, the Reverend *Henry Nicholas Astley*, for his life; with Remainder to the same Trustees to preserve contingent Remainders; with Remainder to the first and every other Son of his said Nephew, then begotten, successively, in tail-male; with Remainder to the right Heirs of his Nephew *Henry Nicholas Astley*: and the Testator declared that the term of 500 years was limited to the Trustees upon Trust to raise and pay the several Legacies therein bequeathed to his Grand-daughter *Mary Grace Lady Palmer*, Sir *John Henry Palmer*, his Grand-daughter *Catharine Watson*, the Children of his Grand-daughter *Lady Palmer*, his Sister the last-named *Mary Milles*, and his Nephew *Henry Nicholas Astley*, with a proviso for the cesser of the term on the Trusts thereof being performed: and the Testator directed the Tenants for Life, and all the other Persons who should successively come into possession of the Manors and Hereditaments thereby devised, to assume the Name and Arms of *Milles* only, within six months after his death, on pain of forfeiting the Estates limited to them respectively: and he appointed his Wife, *Mary Elizabeth Milles*, sole Executrix and Residuary Legatee of his Will.

By Indentures of Lease and Release, dated the 29th and 30th of January 1819, made between *Richard Milles* of the first part, *George Stillyard King* of the second part, and *Thomas Starr* of the third part (the Release reciting that *Richard Milles* had determined to suffer a Recovery of the Messuage and Rectory purchased of the Dean and Chapter of *Norwich*, comprising the Hereditaments formerly Leasehold devised by *Richard Warner*, and to limit the same to himself in fee, dis-

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charged of all Estates Tail) and by a Recovery duly suffered accordingly, the last-mentioned Hereditaments were conveyed and assured to the use of *Richard Milles* in Fee.

Richard Milles, made a Codicil, dated the 17th February 1820, and, after stating that, since making his Will, he had suffered a Recovery of certain Messuages, Lands and Tenements in *North Elmham*, *Gately* and *Colkirk*, in *Norfolk*, and also of the Site of the Rectory and Parsonage of *North Elmham*, which he purchased of the Dean and Chapter of *Norwich*, and that, by the Deed to suffer the said Recovery, the Fee of the Premises was vested in him, and he did, by that Codicil, give the said Hereditaments and Premises so purchased by him, unto the Honourable *George Watson*, senior, and Sir *Henry Oxenden*, Bart., the Trustees in his Will named, for the term of 500 years, and, subject thereto, to the use of his, the Testator's, Grandson, the Honourable *George John Watson*, during his life, and, after the determination of that Estate, to the use of the first and every other Son of his said Grandson, successively, in tail-male, with Remainders over to such and the same Persons, and to and for such uses, estates and purposes as he had, by his Will, devised his Manors and all other his Estates in *Norfolk*.

Richard Milles died, in September 1820, leaving *Lewis Richard Lord Sondes* his eldest Grandson and Heir-at-Law; and, after his decease, *Mary Elizabeth Milles*, his Widow, proved his Will. *George John Watson* assumed the Name and Arms of *Milles* only, as directed by the Will.

Mary Elizabeth Milles made her Will, dated the 9th November 1820, and thereby, amongst other Legacies, left 200*l.* to the Plaintiff, *Mary Ann Elizabeth Astley*; and she also left Legacies, altogether to a large amount, to the Defendants, *Henry Nicholas Astley*, *Mary Grace Lady Palmer*, and her Grandchildren *Henry Watson*, *Richard Watson*, *Catharine Watson*, and *George John Milles*, and appointed the said *George John Milles* her Executor and Residuary Legatee. *Mary Elizabeth Milles* died in September 1823: and, after her decease, *George John Milles* proved her Will.

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The Bill, after stating to the effect aforesaid, alleged that the 10,000*l.* by the Deed Poll appointed by the first-named *Mary Milles* to be paid to *Mary Milles*, the Daughter, and by her sold and assigned to *Richard Milles*, and the 5,000*l.* in like manner appointed to be paid to the Executors, Administrators and Assigns of *John Milles*, and by him sold and assigned to *Richard Milles*, and also the 2,500*l.*, part of the 10,000*l.*, in like manner appointed to be paid to *Henry Lee Warner* and *John Astley*, in Trust as aforesaid, to which *Henry Nicholas Astley* would have been entitled, and which was by him sold and assigned to *Richard Milles*, and the 6,529*l.* 17*s.* 4*d.*, by the term of 1,000 years, created by the Indentures of Lease and Release of the 1st and 2d October 1801, secured to be paid to *Richard Milles* as before mentioned, formed part of his Personal Estate at the time of his decease; and that *Mary Elizabeth Milles*, his Widow, became entitled thereto as Residuary Legatee named in his Will, and that the same Sums of Money, with the Interest due thereon, formed part of the Personal Estate of *Mary Elizabeth Milles* at the time of her decease: That *Richard Milles*, in his life-time,

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always considered those Sums as part of his Personal Estate, and *Mary Elizabeth Milles* also, in her life-time, always considered them and the Interest due thereon as part of her Personal Estate, and, at the time of making her Will, calculated upon those Sums and the Interest due thereon for the payment of the Legacies given by her Will; and that her Personal Estate, independently of those Sums and the Interest due thereon, was, at the time of making her Will and of her death, wholly insufficient for the payment of the Legacies given by her Will: That *Mary Milles*, the Sister of *Richard Milles*, died after his decease, having made her Will, dated the 11th of May 1816, and thereby appointed *Edward William Corry Astley* and the said *Richard Milles* Executors thereof; and that, since her decease, *Edward William Corry Astley* had proved her Will: That *Lewis Thomas Lord Sondes* died many years ago, having, in his life-time, made his Will, dated the 2d of May 1803, and thereby appointed the Honourable *George Watson*, senior, and the Honourable *Henry Watson*, Executors thereof, who since his decease had proved his Will: That the Defendants *Lewis Henry Palmer*, *Geoffrey Palmer*, *Theodosia Mary Palmer*, *Charlotte Palmer*, *Grace Palmer*, and *George John Palmer*, were the only Children of *Mary Grace Lady Palmer*, and that *Catharine Watson* was then unmarried: that *Dame Ann Astley*, Wife of Sir *Edward Astley*, died many years ago: That *Lewis Cage* died, some years ago, leaving *John Lord Wodehouse* him surviving, and that he (Lord *Wodehouse*) had, since the decease of *Richard Milles*, raised and paid, or was immediately about to raise and pay, by the means directed by the Indentures of the 13th and 14th of December 1773, the 10,000 *l.*, by the Deed Poll of the 24th October 1775, by the first-named *Mary Milles*, directed to be

paid to *Henry Lee Warner* and *John Astley*, upon Trust as in the Deed Poll mentioned, with the Interest thereon, except the 2,500 *l.*, part of the last-mentioned 10,000 *l.*, to which *Henry Nicholas Astley* would have been entitled as aforesaid, and which was by him sold and assigned to *Richard Milles*, as before mentioned : That *John Astley* died, many years ago, leaving *Henry Lee Warner* him surviving, who afterwards died, having appointed *Daniel Henry Lee Warner* his Executor : That *George John Milles* had Issue one Son only, *George Watson Milles*, who was the first Tenant in Tail of the Estates devised by *Richard Milles* : That the 10,000 *l.*, 5,000 *l.*, 2,500 *l.*, as also the 6,529 *l.* 17 *s.* 4 *d.* ought to be raised and paid to *George John Milles*, for the purpose of enabling him, by that means and the other Estates and Effects of *Mary Elizabeth Milles*, to pay the Legacies given by her Will. The Bill charged that these Sums formed part of the Personal Estate of *Richard Milles*, at the time of his decease, and that *Mary Elizabeth Milles* became entitled thereto as his Residuary Legatee, and that the same were always considered by *Richard Milles* as part of his Personal Estate down to the time of his decease : That the words in his Will : " Subject, as to my Manors and Estates, to such Charges and Incumbrances as may be charged thereon at the time of my decease," had an express reference to such of the said Sums of Money as were charged on the Manors and Estates comprised in his Will : That *Mary Elizabeth Milles* always considered those Sums as part of her Personal Estate ; that she calculated those Sums as part of her Personal Estate in giving the Legacies given by her Will, for the payment of which her other Personal Estate and Effects at the time of making her Will, and of her death, were wholly inadequate : That several of

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the Legacies, given by her Will were given to *George John Milles*, and others of the Parties Defendants thereto, who, under the Will and Codicil of *Richard Milles*, were entitled to Estates and Interests in the Hereditaments charged with those Sums of Money: That, in case those Sums did not form part of the Personal Estate of *Richard Milles*, and *Mary Elizabeth Milles* did not become entitled thereto as his Residuary Estate, yet, by reason of her considering herself entitled to such Sums, and the Interest thereon, and her intention to dispose of and her having disposed of the same by her Will, *George John Milles*, and such other Persons as aforesaid, ought to be put to their election whether to take under the Will of *Mary Elizabeth Milles* or against it; and that, in case they elected to take under the Will, then they ought, to the extent of their respective Estates and Interests in the Hereditaments under the Will and Codicil of *Richard Milles*, to confirm the disposition made by *Mary Elizabeth Milles* of those Sums. The Bill prayed that it might be declared that the 10,000*l.*, 5,000*l.*, 2,500*l.*, and 6,529*l.* 17*s.* 4*d.* formed part of the Personal Estate of *Richard Milles* at his decease, and that *Mary Elizabeth Milles*, his Widow, became entitled thereto, as the Residuary Legatee named in his Will, and that those Sums might be raised by Sale or Mortgage of the Hereditaments comprised in the term of 500 years created by the Indentures of the 13th and 14th of December 1773, and the Common Recovery suffered in pursuance thereof, and by Sale or Mortgage of the Messuage or Tenement, Rectory and Hereditaments comprised in the term of 1,000 years, created by the Indentures of the 1st and 2d of October 1801; and that those Sums, when so raised, might be paid to *George John Milles*, and be, by him, applied, together with the other Personal

Estate of *Mary Elizabeth Milles*, in a due course of administration; and, in case the Court should be of opinion that those Sums did not form part of the Personal Estate of *Richard Milles*, and that his Widow did not become entitled thereto as the Residuary Legatee named in his Will, then that it might be declared that *Mary Elizabeth Milles* intended to dispose of and that she did, in fact, dispose of those Sums by her Will, and that *George John Milles*, and such other of the Defendants as were Legatees named in her Will and also took Interests under the Will and Codicil of *Richard Milles* in the Hereditaments charged with those Sums, ought to elect, and that they might be put to elect whether to take under the Will of *Mary Elizabeth Milles* or against it; and, in case they should elect to take under her Will, then that they might be ordered, to the extent of their respective Estates in those Hereditaments, to confirm the disposition, made by *Mary Elizabeth Milles*, of those Sums of Money; and, in case they elected to take against her Will, then that they might be ordered to give up all their Interests under her Will for the benefit of the Plaintiff and the other Legatees named therein.

The Defendant, *George John Milles*, by his Answer, denied that the Sums in question formed part of *Richard Milles's* Personal Estate at his decease, or at any other time subsequently to his purchase of the Remainder in tail of the Estates from *Lewis Richard Lord Sondes*: and he submitted that those Sums had become merged or extinguished in the Inheritance of the Hereditaments originally charged therewith: and he said that *Richard Milles* intended that they should be extinguished for the benefit of the persons entitled to the Estates charged therewith: That the words in *Richard Milles's* Will, particu-

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larly referred to in the Bill, had not any reference to such of the Sums as were charged on the Estates comprised in his Will, but referred, wholly or principally, to the charge or charges to the extent of 7,500 *l.*, part of the 25,000 *l.*, which was not purchased by *Richard Milles*, as also to the particular charges to which the Estate purchased of the Dean and Chapter of *Norwich* were made subject, under the Leases thereof, and the Conveyance of the Reversion thereof by the Dean and Chapter, under the direction of the Commissioners : he admitted that the Personal Estate of *Mary Elizabeth Milles*, independently of the Sums in question, were greatly inadequate for payment of the Legacies given by her Will, and that she, finding that her right to those Sums was not admitted, determined to file a Bill in this Court for the purpose of establishing her right thereto, and that she had given instructions for the filing of such Bill, and that the Draft was prepared and would have been filed if she had not died at the time she did : he also admitted that several of the Legacies given by the Will of *Mary Elizabeth Milles* to him, the Defendant, and to others of the Defendants who were entitled, under the Will and Codicil of *Richard Milles*, to Estates and Interests in the Hereditaments charged with the Sums of Money ; but said that those Defendants ought not to be put to their election whether to take under or against the Will of *Mary Elizabeth Milles*.

Mr. *Starr*, a Solicitor, who was one of the Witnesses in the Cause, deposed that, about November 1818, he was professionally concerned, for *Richard Milles*, in a Purchase made by him from *Lewis Richard Lord Sondes*, of the benefit of the Remainder in tail of *Lewis Richard Lord Sondes*, in the Manor of *North Elmham*,

Nowers, and other Manors and Estates in *Norfolk*; and that, in estimating the gross Value of such benefit, a Sum of 25,000*l.*, which was considered by *Milles* and Lord *Sondes*, as a Charge upon the Estates, and in which Sum the Witness believed that the Sums of 10,000*l.* 5,000*l.* and 2,500*l.* were considered by *Milles* to be included, was deducted from such gross Value, and that a Sum of 6,800*l.*, which was considered by *Milles* and Lord *Sondes* as a Charge upon an Estate purchased of the Dean and Chapter of *Norwich* by *Milles*, the Rent of which Estate was included in the gross Rental of the first-mentioned Estate, was also deducted from such gross Value: That he was the Solicitor of *Mary Elizabeth Milles* for two years and upwards before her Death: That he believed that she considered the Sums of 10,000*l.*, 5,000*l.* and 2,500*l.*, amounting together to 17,500*l.*, as part of the Personal Estate of *Richard Milles*, and as part of her own Personal Estate, down to the time of her Death; because, in her character as the sole Executrix of the Will of *Richard Milles*, when she proved the same, she did, in computing the amount of the Value of the Personal Estate of *Richard Milles*, at the time of his death, include a Sum of 17,500*l.* his Proportion of a Charge upon an Estate in *Norfolk*; and did also, in the like character, and as the Residuary Legatee named in the Will of *Richard Milles*, include a similar Sum of 17,500*l.* in the particulars of the Account of his Personal Estate, which was sent to the Legacy Duty Department; and because, in conversations with *Mary Elizabeth Milles*, upon the subject of the 17,500*l.*, she considered it as part of her Property: That *Mary Elizabeth Milles* did, in her Life-time, determine to file a Bill, for the purpose of establishing her right to these Sums of 10,000*l.*,

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5,000*l.* and 2,500*l.*, but she never mentioned to him the Sum of 6,529*l.* 17*s.* 4*d.*; and that she gave instructions to him for the filing such Bill, and the Draft of such Bill was prepared, in or about Trinity Term 1823, and waited only for some necessary revision previously to the filing thereof; and that such Bill would have been filed in the ensuing Michaelmas Term, if *Mary Elizabeth Milles* had not died at the time she did.

Thomas Smith, another Witness, and who had been *Richard Milles's* Solicitor, from 1781 down to his Death, deposed that *Richard Milles*, at the time he gave the Witness instructions for his Will, which was in the month of November 1818, showed to the Witness the Deed of Appointment, made by *Mary Milles*, his Mother, charging his Estates in *Norfolk* with the payment of 25,000*l.*, upon which Deed the Discharges by *Mary Milles* the Daughter, and *John Milles*, for the Sums of Money to which they were entitled under the Deed of Appointment, were indorsed, and which Discharges so indorsed, *Richard Milles* told the Witness were prepared by Messrs. *Forster, Cook and Frere* of Lincoln's Inn: That a Discharge, from *Henry Nicholas Astley*, for the Sum to which he was entitled under the said Deed, was prepared by the Witness: That Witness did not know how the Sum of 6,529*l.* 17*s.* 4*d.* was paid or discharged: that he believed that *Milles* considered the several other Sums to be extinguished, as a Charge on his Estate, at the time he paid the same: That, in November 1818, when *Milles* gave the Witness instructions for his Will, he said to the Witness: "Mr. *Smyth* my Mother had a power to charge this Estate (meaning the *North Elmham* Estate) with 25,000*l.*; this would have been a heavy Incumbrance upon the Estate

I shall give to my Grandson, *George John*. The Charges which I have paid to my Brother *John*, and Sister *Mary*, I have paid out of my own Money; and I intend my Grandson should have the Estate discharged from them; for I do not consider the Monies I have paid as a Debt due to myself: " That he also said to the Witness: " If you have not seen the Deed creating the Charge, I will show it you: " upon which he produced a Deed of Appointment, by *Mary Milles*, his Mother, creating a Charge of 25,000*l.* on the Estate belonging to him at *North Elmham* and in other Parishes, upon which the Discharges from *Mary Milles*, the Daughter of *John Milles*, were indorsed: That the Witness inspected the Deed, and said to *Milles*: " Your paying these Sums is a great act of kindness and affection towards your Grandson."

Mr. *Pepys*, and Mr. *Boteler*, for the Plaintiff:

The question in this Case arises upon the transactions which took place in the year 1818. In that year *Richard Milles*, who had then a Life Interest in the Estates, acquired, by a Conveyance and Recovery, the Reversion in Fee-simple: and the question is, whether he intended that the Charges which he had bought up should be merged. In discussing this question, it is very important that the language of the Release of 1818 should be attended to. Now that Deed not only recites the Trusts of the term of 500 years, but expressly declares that all the Charges on the Estates should be kept alive. And there was an evident reason for this: for *Richard Milles* had not the absolute and entire dominion over the Property, but only a Life Interest in it, with the Reversion in Fee, which was

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subject to be defeated by other Persons coming into existence, who would have taken Estates Tail in it. In the same year, *Milles* made his Will; and the language of it is in accordance with the Deed: for he devises his Manors, &c. subject to the Charges that might be thereon at the time of his decease. Can it be said that these Charges did not exist, when, only a Month before, he had said that they should exist? Would he have inserted these words in the Deed and in his Will, if he had intended that the Charges should be merged? Besides, *Milles* did not buy up the whole 25,000*l.*, but left 7,500*l.* outstanding; and it could not be his intention to purchase the 17,500*l.* for the benefit of the persons entitled to the remaining Charges. *Lord Compton v. Oxenden* (a), and *Forbes v. Moffat* (b).

2d. As to the Leaseholds. Not only by the acts done by *Richard Milles*, but by the provision of 39th Geo. 3, c. 108, the Money paid for the purchase of the Reversion remained the Property of *Richard Milles* down to the time of his death.

3d. It is quite clear that Mrs. *Milles* considered the amount of these Charges as part of her Personal Estate; and the Defendants who claim benefits under her Will must at all events be put to their election.

The VICE-CHANCELLOR:—

Must not the election arise upon the face of the Will: and can extrinsic evidence be given in order to raise a case of election?

(a) 2 Ves. jun. 261.

(b) 18 Ves. jun. 384.

Mr. Pepys:—

On the authority of *Druce v. Denison* (c), the Plaintiff is entitled to prove extrinsic matter, in order to put the Defendants to their Election.

Mr. Timney, for some of the Defendants whose Interest was the same as the Plaintiff's, said that if the Court should infer that, because the Charges were not mentioned in the Codicil, the Testator intended they should be merged, so far as they affected the Estates devised by the Codicil, it was fair to conclude that he intended them to remain as to the other Estates.

Mr. Shadwell, **Mr. Sugden**, **Mr. Sidebottom**, and **Mr. Reynolds**, appeared for the Defendant, *George Watson, Milles*, and other Defendants in the same interest.

Mr. Shadwell:—

The words: "subject to all Charges," mean so far only as they were subsisting in the contemplation of the Parties, that is, so far only as they were in the dominion of others. Until the Recovery was completed, the Charges were not merged; and therefore those words were introduced in order to show that Lord *Sondes* did not mean to convey an unencumbered Estate. There is nothing in the Will to show that it was the Testator's intention to keep the 17,500*l.* as a subsisting Charge. The Recovery Deed of 1819 manifests that it was *Miller's* intention to make himself the absolute owner of the Leaseholds. Besides, we have evidence which compels a Court of Equity to hold that *Milles* intended the Charges to be merged.

(c) 6 Ves. Jun. 385.

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Mr. *Pepys*, Mr. *Boteler*, and Mr. *Timney*, objected to the evidence being read, on the ground that it tended to raise, not to rebut, a presumption.

Mr. *Shadwell*, Mr. *Sugden*, and Mr. *Sidebottom*, contended that Evidence might be given to show what was the view of the Testator in the acts he was doing. *Pulteney v. The Earl of Darlington* (d), and *Monck v. Lord Monck* (e): that the evidence offered tended to show what was the view taken by the Testator of his affairs: that the question was not what was the effect of a Deed, or of a Will, but whether it was the intention of *Milles* that the Charges should be kept up: that Lord *Hardwicke*, C. had decided that a person might elect, by parol, whether he would have an Estate that had been directed to be sold, or its produce (f): that here *Milles* had declared, on a solemn occasion, that he intended the Charges to be merged; and that such a declaration of intention must be received as evidence.

Mr. *Pepys*, in reply as to the admissibility of the Evidence, said that the question turned upon whether the Evidence was given to raise or to repel a presumption: that *Milles*'s acts did not give Title to the Defendants: that, if they did, the Defendants did not want the aid of the Parol Evidence: that if an Executor had a Legacy given to him, or by any other means was made a Trustee of the Residue, the next of Kin were never required to give evidence to show that the

(d) 1 Bro. C. C. 223. (e) 1 Ball & Beatt. 298.

(f) Mr. Sugden stated this to have been decided in a Case of which he had a manuscript Note.

Testator did not intend the Executor to take the Residue beneficially: that, if the manuscript case cited by Mr. Sugden, were Law, parol declarations might be admitted to alter the nature of Property: that if the Defendant was entitled to hold the Estates discharged of the Sums of Money, he was so entitled by the effect of a legal presumption, and could have no right to read the Evidence in order to aid that presumption: That the question must be decided on the expressions of the Instruments themselves: That those Instruments expressed that it was *Milles's* intention that the Charges should be kept up, and it was *Milles's* interest that that should be the case: and that the distinction between parol evidence, and evidence raised from solemn acts, was plain; for that the most solemn declarations might be altered from day to day.

The VICE-CHANCELLOR decided that the evidence ought to be received; because the Court was to act upon the intention of Mr. *Milles*, and was therefore bound to hear all the evidence that could be fairly given upon that subject.

Mr. Sugden, for the Defendants:—

When *Milles* addressed himself to acquire the Reversion in fee, there was no probability that the prior Remainders would take effect: When he had accomplished that object, the Charges which he had previously purchased, became extinct in Law. It is quite clear that he considered that there was an end of all the Charges, or else he never would have given 42,000*l.* for the Reversion. If he had not kept the Charges on foot before he acquired the Reversion, he would have

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increased Lord *Sondes*'s interest merely, and not his own. As he eventually became owner of the fee, as well as of the Charges, what end could it answer to keep the latter on foot. So far from any declaration being necessary on the part of *Milles* to keep the Charges subsisting, they must be held to be merged unless there is plain evidence of a contrary intention. If *Milles* had had born Issue-male, the Charges would have been cut out, as well as the Reversion divested. Although the merger of the Charges which were bought up, will benefit the persons entitled to the benefit of those that remain, that affords no argument against holding the former Charges to be extinguished; for, if the owner of the inheritance of an Estate pays off a prior charge, he thereby gives precedence to the subsequent encumbrances.

The words in the Will: " subject as to the said Manors and Estates, to such Charges and Encumbrances as might be charged thereon at the time of his decease," do not extend to the Rectory. But can it be supposed that the Testator, intending to dispose of the Rectory in the same manner as the rest of his Estates, meant that the Charges should subsist as to the one, and be merged as to the other? The words relied upon by the Plaintiff relate to the 7,500*l.* only. If the Testator had not considered the first term of 500 Years to be merged, he would not have created another term for the purpose of raising Money to pay his Legacies, but would have directed the 17,500*l.* to be applied for that purpose. It is clear, therefore, that the Charges became extinct, immediately upon the purchase from Lord *Sondes*, or, at all events, that they were destroyed

by the Will and Codicil, which are a clear disposition of all *Milles's* interest, both legal and equitable, in these Estates.

The Evidence, if it should be necessary to resort to it for the determination of the question, contains an express decision, by the Testator, upon the subject.

Mr. Sidebottom:—

A Tenant in tail, or one having an Estate of Inheritance, cannot have, co-existing with his Estate, and yet separate from it, a Charge upon the same Estate: when they come together in the same person they must merge. *Jones v. Morgan* (g). *Countess of Shrewsbury v. Earl of Shrewsbury* (h). *Donisthorpe v. Porter* (i). *Lord Compton v. Oxenden* (k). In this latter case the rule is laid down as the necessary legal result of the union of the Estate and Charge, and that the Court, without express declaration to the contrary, must presume the intent of the Owner of the Inheritance, in buying off the Charge, to have been to exonerate the Inheritance from the encumbrance.

But then it is said, this presumption may be rebutted by express intent. We contend that there is no such expressed intent, and what the Plaintiff adduces as such is easily explained away. In *Countess of Shrewsbury v. Earl of Shrewsbury*, it is laid down, as a general rule, that the true ground of the inference in favour of a Tenant for Life paying off an Encumbrance, is the scantiness of his Estate; but this

(g) 1 Bro. C. C. 206.

(i) 2 Eden, 162.

(h) 1 V. J. 227.

(k) 2 V. J. 261.

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rule does not apply here. We must see what was the Estate that *Milles* considered himself to have, and not what the Estate was which he actually had. He evidently considered himself to have an Estate of Inheritance. His and his Wife's ages precluded any idea of having any Children. He so recites it in the Deed under which he took the Reversion from Lord *Sondes*. Besides, if he had had an intention to keep alive the Charges, it is to be supposed that he would have plainly declared such intent: that intention, too, should have been declared at the time of purchasing the Reversion. It is not sufficient that it was declared at the time of purchasing the Land Tax. In the long time intervening between the two purchases he may have changed his plan; besides, when he purchased the Land Tax, his Estate was only for Life.

In the Purchase-deed from Lord *Sondes* the Covenants are absolute: there is no exception of incumbrances: and no Conveyancer would have so framed them if the Purchaser's intent had been to keep them alive. In that case the Charges would have been excepted.

The next expression of intention is stated to be in the Will. The words in the Will are: "subject to such Charges and Encumbrances as may be charged thereon at the time of my decease." These words are satisfied by the Charge of 7,500*l.*, the residue of the 25,000*l.*, which is admitted, on all hands, to be still existing; or he may have contemplated creating a new Charge, and afterwards abandoned the intention. These words, indeed, rather imply that there were no Charges existing at the time; for, otherwise, he would have stated the

Devises to be subject to Charges then existing, and which might be existing at the time of his death : the inference, therefore, is fairly the reverse of that contended for on the other side. In the Codicil there is no reference to any Charges. This is very material, and confirms the supposition that, at the date of his Will, he contemplated to create Charges, and that, in the interim between that time and the date of the Codicil, he altered his plans.

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Mr. Reynolds cited *Kelly v. Power* (*1*). He said that a strong presumption of Law could not, as to its legal effect, be resisted by any slight expression of intention. The argument, that the Testator had a direct interest in keeping up the Encumbrance for the benefit of his Children, in case he should have any, falls to the ground, when it is remembered that, so far as the Freeholds were affected, no Charge was to arise in case of any Son being born, the default of Male Issue being the event on which the Encumbrance was to come into operation. *Milles* could not, therefore, have looked to the birth of Sons ; and the fair inference is, that, if he did not expect the birth of a Son, he also did not expect the birth of a Daughter, especially when it is remembered that he and his Wife were very old. He must therefore be considered as deeming himself, in effect, owner of the Inheritance. If he expected to have Children, why did he ever purchase the Reversion from *Lord Somers* ? He must have known that if he should have Children, his purchase-money would be thrown away, because, under the original Limitations, his Children would have taken the same Interest as he laid out his Money in purchasing.

(*1*) 2 Ball & Beatt. 236.

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Mr. *Pepys*, in reply:—

When no intention is expressed, it must be perfectly indifferent, to the party in whom the interests unite, whether or not the Charge should subsist, before the Court will deem it merged. Now, in this case, it is evidently not a matter of indifference; for the birth of a Son would have cut down *Milles's* Estate. With regard to the Evidence read on the other side to show the Testator's intent, it does not make out the Defendant's case. The want of direct Evidence to show a distinct intention to merge the Charges, is conclusive proof that the Testator had no such intention.

After the argument was concluded, Mr. *Pepys* referred the Court to *Drinkwater v. Combe* (m), and *Wigsell v. Wigsell* (n).

The VICE-CHANCELLOR:—

I do not think the recitals in the Deeds so important as is conceived. They were not introduced with a view to show the Testator's intent to keep up the Charges. If any such intent had existed, the parties would not have left it to a recital merely. In the Covenants or some other clause, there would have been introduced evidence of such intent. The sole object of the recitals, as it appears to me, was to show, solemnly under Seal, that the money given was the full value under the circumstances; in fact, to explain the reason of a sum, apparently so small, being given for it. Another object of the recital was, to show that the Reversion was subject to a possibility of being defeated, and not sold as an absolute indefeasable Estate.

(m) 2 Sim. & Stu. 340.

(n) Ibid. 364.

The VICE-CHANCELLOR:—

In this Case the Bill is filed by *Mary-Ann-Elizabeth Astley*, the Executrix and Residuary Legatee under the Will of the Widow of *Richard Milles*, deceased. The Defendants are the Hon. *George John Milles*, who is the first Tenant for Life of the real Estates devised by the Will of that *Richard Milles*, and *George Watson Milles*, who is the Son of *George John Milles*, and the first Tenant in Tail of these Estates. There are several other Defendants, but I need not specify their characters; it is sufficient to say that they are either interested in the question as raised, concurrently with the Plaintiff, or they are interested with the Defendants, the Tenant for Life, and the Tenant in Tail, in the Realty; or, in the character of Trustees, are necessary, according to the forms of the Court, to sustain the Suit, by having all the Parties before it. The Prayer of the Bill is, that it may be declared that certain Estates in the county of *Norfolk*, devised by the Will of *Richard Milles*, are subject to two Charges, one of 17,500*l.*, and the other of 6,599*l.* 11*s.* 4*d.*, which are secured by certain outstanding Terms, which belonged to the Testator at the time of his decease, and praying that directions may be given for raising these Charges for the benefit of the Estate of Mrs. *Milles*, and applying them, as a part of her Estates, in a course of Administration. The Bill has a Prayer in the alternative, that, if the Court should be of opinion that these Sums ought not be raised, then, as the Assets of Mrs. *Milles* will not satisfy her Debts and Legacies, those who take Benefits under her Will, and under the Will of *Richard Milles*, may be put to their election between the two Interests.

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The uses of the term of 500 years, which was vested in *Cage* and *Wodehouse*, are as follows: after the death of *Mary Milles*, and after the death of *Richard* and *John Milles*, and failure of their Issue, (if that contingency happened,) to raise 25,000 *l.*, and pay it to such Persons as *Mary Milles* should, by Deed or Will, appoint. This Deed having thus limited the Estates in strict Settlement, by an Indenture, bearing date the 24th October 1775, *Mary Milles* executed this power, and appointed the Sum of 25,000 *l.* By that Instrument she appointed 10,000 *l.* to her Daughter, *Mary Milles*, 5,000 *l.* to her Son *John Milles*, and the remaining 10,000 *l.* she appointed between the family of her second Daughter, *Lady Astley*. The particulars of that distribution need not further be adverted to, beyond the fact that 2,500 *l.*, a portion of that, afterwards became vested in Sir *Nicholas Astley*, one of *Lady Astley*'s Sons. Of course the benefit to arise under this appointment depended on the contingency that neither *Richard Milles* nor *John Milles* should have any Issue-male. In 1801, *Richard Milles* contracted, with the Dean and Chapter of *Norwich*, to purchase the Inheritance of the Rectory of *North Elmham*. They were enabled to make the Sale under the powers of the Land Tax Redemption Act; and the price agreed upon was a Sum amounting, altogether, to 6,529 *l.* 17*s.* 4*d.*, the Sum of 5,967 *l.* 10*s.* 1*d.* being the value of the Estate, and the remainder being the value of the Timber. The Purchase-money was paid by *Richard Milles*, with his own Money; and a Conveyance was executed, in September 1801, by the Dean and Chapter, by which they, at the requisition of *Richard Milles*, conveyed the Estate to *Wodehouse*, in Trust to be held upon the uses of the Deed therein referred to as intended to be executed by the Parties. That other Deed, so referred

to, appears to be executed in October 1801; and it is material, for the Plaintiff's Case, to observe that this Conveyance recites that the immediate Estate and Interest in the then existing Lease, as well as the Reversion in fee expectant on these Estates, should be charged with the re-payment of the Purchase-money which *Richard Milles* so paid; and that, subject to that charge, the Inheritance should be conveyed in the manner thereafter expressed. The Deed then proceeds, in its operative part, to witness that, in pursuance of the direction and agreement of the Parties, *Wodehouse* conveyed the Rectory and Lands to the use of Lord *Sondes*, for the term of 1,000 years, and, after the expiration of that term, to such of the uses of the Will of *Richard Warner* as precede the Limitation to the Heirs-male of the body of *Mary Milles*, as were then subsisting and capable of taking effect, with Remainder to the Heirs-male of the body of *Mary Milles*, with Remainder to the right Heirs of *Richard Warner*. These Limitations plainly show that *Richard Milles* considered himself as purchasing the Inheritance for the benefit of the Persons entitled to the Leasehold Interest, under the Will of *Richard Warner*; and that, I think, plainly shows that he did not, at that time, intend or contemplate the merger of the Charge which was created by this Purchase of the Inheritance. It is upon this Sum that the second question arises.

The Title remained in this state till the year 1808. In that year *Richard Milles* purchased, from his Sister *Mary*, her contingent Interest in the 10,000*l.*; and, by an indorsement on the Deed of Appointment, dated the 21st of June 1808, she, for a certain Sum, assigned the 10,000*l.* to a Person of the name of *Deedes*, in Trust to be disposed of as *Richard Milles* should appoint,

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and, in default of his direction or appointment, in Trust for *Richard Milles*, his Executors, Administrators and Assigns. On the 12th October 1810, *Richard Milles* purchased *John Milles*'s contingent Interest in the 5,000 *l.*, and took an Assignment by a similar indorsement upon the Deed of Appointment. In 1817, he purchased *Henry Nicholas Astley*'s Interest in the 2,500 *l.*, and took a similar Instrument of Assignment.

Upon these sums, amounting together to 17,500 *l.*, the material question arises.

In 1818, *Richard Milles*, having at that time no Issue-male living, being very far advanced in Years, his Brother being dead without Issue-male, seems to have formed a plan to create a new head to the Family, which should bear his name, instead of permitting it to merge in the eldest Grandson, *Lord Sondes*, who would not only be his Heir-at-Law, but would be the existing head of the Family, and would represent him as far as a Man and his Family could be represented through the female Line. He therefore in that year contracted with his Grandson, *Lord Sondes*, to purchase his Reversionary Interest in the Estate in question; and the Purchase-money being agreed at the sum of 42,000 *l.*, a Recovery was suffered, which barred all the Limitations subsequent to that which gave to *Lord Sondes*, as Tenant in tail in Remainder expectant on the death of his Grandfather *Richard Milles*, the Estate-tail on failure of Issue-male of *Richard Milles*. That expectant Estate-tail in Remainder was conveyed directly, in fee, to *Richard Milles*, the purchaser. At this period *John Milles* was dead. The only intervening contingency at that period was the event of *Richard Milles*, the Grandfather of *Lord Sondes*, having Issue-male;

and it appears, on the face of the Record, that at that period *Richard Milles* must have been of the age of nearly Seventy years; that he had his Wife living, and that he contemplated her surviving him; and, therefore, he could not well have contemplated that he himself should have Issue-male to displace the ultimate Remainder to the Issue-female. In this situation, having completed the Purchase from Lord *Sondes*, and being Master of the Fee, he made his Will, dated the 2d September 1818: and, as several passages in that Will have been referred to and represented, by each side, as affording inferences of Intention on the part of the Testator as to the Merger or Non-merger of the Charges, those passages will deserve some observation. The general Plan of the Will is certainly a correct technical form of Limitation. As far as it is necessary to detail them they are as follows. He devised the Estates in *Norfolk* to Trustees for a Term of 500 Years, and, subject thereto, to his second Grandson, *George John Watson*, with Remainder to *George John Watson*'s first and other Sons in tail-male, with Remainders to his two other Grandsons, *Henry* and *Richard Watson*, and their first and other Sons in like manner, with Remainders to his Grand-daughters, *Lady Palmer* and *Miss Watson*, for their Lives, and to their second and subsequently born Sons, in tail-male, with Remainders to his Nephew, *Henry Nicholas Astley*, for Life, and to his first and other Sons in tail-male, with Remainder to the right Heirs of *Henry Nicholas Astley*; thus entirely passing over the Female Issue of all his Grandchildren.

One cannot read these Limitations without considering there was something capricious in the way the

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Testator thought fit to show an antipathy to the eldest Sons of his Grand-daughters. But it seems fair to infer that he did not take the Estate out of the Line of Lord *Sondes*, his immediate Heir, from any particular objection to, or dissatisfaction with Lord *Sondes*; but to have a younger branch of the Family for his Representative; so that, if possible, his Name might not merge in the Dignity of Lord *Sondes*; and, for that purpose, he imposed upon those who took the Estates, the obligation of taking the Name and bearing the Arms of *Milles*. He then, having thus limited his Estates, declares the Trusts of the Term of 500 Years for raising certain pecuniary Legacies. But that Term of 500 Years could not be brought into Action without exhausting, first of all, the general personal Estate of the Testator: and, if this Bill is rightly framed with regard to the Charges in question, the 17,500*l.* also must have been exhausted in Payment of these Legacies before the Term of 500 Years could have been brought into operation. He afterwards made a Codicil, which does not affect the present question, and died; and he left his Widow his sole Executrix and Residuary Legatee. He died some time after the year 1818.

These are the material Facts on which the question arises, whether it is now, according to the rules of a Court of Equity, to be considered that these Charges are subsisting, and that the estate passed, in equity, *cum onere*. That they are *legal* subsisting Charges is not to be disputed; because they are secured by an outstanding legal term: and the question then is, whether a Court of Equity is to lend itself to raise these Charges under this state of Facts, or

whether it is to consider that the Testator intended (for his Intention constitutes the whole subject of Right) that those Charges should merge for the benefit of those who, under the Limitations of his Will, took the real Estate.

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The argument was gone through, on each side, very laboriously, and most ably ; and the Court was greatly assisted, not only from the observations which fell from the Bar, but likewise by reference to the Authorities : and I think I may consider, though not exactly in the series and order in which the Case was presented by the various Counsel to the view of the Court, the subject as represented thus : On the part of the Plaintiff and those who are in the same interest, it was insisted that both the 17,500*l.* and 6,529*l.* 17*s.* 4*d.* ought to be raised for the personal representative of the Testator, because they are secured by an outstanding legal Estate ; and that there was no reason why a Court of Equity should prevent the exercise of those legal rights for the benefit of the personal representative, or refuse its concurrent authority in raising them. On the part of the Defendants who are interested in the Inheritance, it was insisted that the Charges, though subsisting in Law, ought to be considered, in Equity, as merged for the benefit of the Inheritance ; and, on both sides, it was taken, as a fact, that the Testator, having an absolute interest in both the sums at the time of his death, the intention on his part, if it could be collected either by evidence, or by satisfactory legal implication, must prevail.

I think that the arguments on the part of the Plaintiff, who insists that the term ought to be put in action, and

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that the Court ought to assist in raising the money, may be classed under three heads; the first of which presents itself thus: that the Testator had only a limited interest in the freehold up to the time of his death; that the established rule of construction in a Court of Equity is thereby to raise the presumption that he did not intend the Charges to merge in the Inheritance: secondly, that the presumption arising from the effect of the Testator's Estate in the Freeholds, is supported by the contents of the Instrument which creates the Charges: and, thirdly, that the language of the Testator's Will may be considered as containing a declaration plain that he intended the freehold should *cum onere*.

On the part of the Defendant *George J. Milles* and the other Defendants who are interested in the realty, I think their arguments may be divided under these heads: First, if the Court is to regard the spirit, and not the letter of the authorities which establish the rule of construction, the Testator was, in substance, the owner of the Inheritance in fee, the intervening contingency being, from the circumstances of the Testator and his family at the time, a mere shadow, and not a real risk which the Court could regard. Secondly, if it is competent for the Court to resort to technical presumption, in this Case, to find out the Testator's intention, the contents of the Will taken in conjunction with the state of the title, afford a balance of presumption that he could not intend the Estates to descend *cum onere*. But, lastly, it was contended that the Court cannot resort to presumption where there is clear and direct proof of intention that the charges should sink for the benefit of the Inheritance: and it is insisted that there is, in this case, positive and direct proof of such intention.

In Cases of this kind it is much more easy to refer to the established rule of the Court, than it is to apply that rule fitly to the circumstances of each Case. The rules have fluctuated, in this respect, as to the quantity of the Estate which shall raise a *prima facie* presumption of the intention of the owner that the Charge should or not pass with the Inheritance. In the Case of *The Duke of Chandos v. Talbot* (a), it appears that the Court considered that a Charge supported by a legal Estate, was very different from one which was supported merely by an equitable Title, or, in other terms, that the rule of intention, or presumptive intention, differed when the Charge in the one case was supported by a legal outstanding Estate, and in the other, where it was a mere equity attaching on the Inheritance without any immediate legal Estate. And, likewise, it appears, by the same Case, that, where the Owner of the Land had an Estate Tail only, and not the Fee Simple, the Court did not presume the intention of Merger. The Chancellor, in delivering his judgment, says: "Indeed had this been a mere equitable Charge upon the Land, and the Fee Simple, not an Estate Tail only, had come to *Lewis Doleman* the Son, it might then have been a Merger." In the Case of *Chester v. Willes* (b) Lord Hardwicke, C. seems to have considered, at that time, that there was a distinction between a Charge subsisting on an outstanding legal Estate, and what was a mere equitable Charge on an Inheritance: he likewise seems to have considered that the quantity of Estate which the party took made an exception to that rule. He refers to the Case of *The Duke of Chandos v. Talbot*, and recognizes that principle as being the Law. However, it may be now considered that, on this point, the

(a) 2 P. W. 601, 604. (b) Amb. 246.

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Rule of the Court is settled, that there is no difference between a Charge merely equitable, and one that is supported by an outstanding legal Estate, nor any difference between an Estate Tail, and a Fee Simple in possession. What is stated by Lord *Eldon*, C. in the Case of *The Earl of Buckinghamshire v. Hobart* (c) will apply to this Case. He says: "If a Tenant for Life pays off a Charge on the Estate, *prima facie*, he is entitled to that Charge for his own benefit, with the qualification of having no interest during his life. If a Tenant in Tail, or in Fee Simple pays off a charge, that payment is, *prima facie*, presumed to be made in favour of the Estate; but the presumption may be rebutted by evidence, as by calling for an Assignment, or by a Declaration." Now when Lord *Eldon* illustrates his position by giving a particular instance, I do not understand him as meaning to say that the rebutter is to depend on the fact of the calling for, or not calling for, an assignment of the Charge. He only refers to it as a particular, distinct fact, which may or may not have any effect on the construction; and that the presumption, either way, may be rebutted by Evidence. Lord *Eldon* never laid down any proposition of Equity for which he had not ample authority. If he was about to reverse the Rule laid down by Lord *King* in the Case in *P. W.* and by Lord *Hardwicke* in the Case in *Ambler*, I think he would have found no authority to support his different conclusion: but, on looking at the cases which intervene between the death of Lord *Hardwicke*, and the period of Lord *Eldon*'s judgment, more especially Cases in the time of Lord *Thurlow* and Lord *Rosslyn*, it is quite clear that he states the rule, not only as sanctioned by his own judgment, but as established by other antece-

dent decisions. It is extraordinary that, taking the rule to exist as it has done, the great majority of the Cases constitute not an adoption of the rule itself, but an exception to the rule, that is, inferences and presumptions rebutting the rule. There was one Case before Lord *Thurlow*, *Jones v. Morgan*(d), where he states very strongly what would have been his opinion if it had been an Estate for Life, and not an Estate Tail, as he considers it to have been.

There were two cases, before the late *Vice-Chancellor*, which struck me very forcibly as deviating from this general principle: but, on looking at those cases, I am quite satisfied that those decisions are not any deviations from the general rule; but they are only, under special circumstances of those particular Cases, exceptions to the general rule. The Cases I allude to are *Drinkwater v. Combe*(e), and *Wigsell v. Wigsell*(f).

I have looked most anxiously to apply the general rule consistently with the acts of the Testator, and I think that those acts do afford evidence that he did not intend the Estate to pass *cum onere*.

I think, however, that this Case, without reference to intention, may be perfectly governed by the evidence of that Solicitor who prepared the Assignment of the Charges to *Richard Milles*. That evidence I have looked at; and, though some observations were made with regard to the nature and context of the Evidence, I see

(d) 1 Bro. C. C. 206. (e) 2 Sim. & Stu. 340.

(f) 2 Sim. & Stu. 364.

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1827.
12th May.

Practice.
Costs.

A Plaintiff resident abroad, who had been ordered to give the security for Costs, but had not complied, ordered to give the Security, and on default, his Bill to be dismissed.

*in remandam 2
Jno 570. intia -
4 Scorn 144
Giddings Giddings
10. Bear. 29*

CAMAC v. GRANT.

AN Order had been obtained, in May 1824, that the Plaintiff, who was resident abroad, should give security for costs. The Plaintiff not having obeyed this Order,

Mr. Knight, for the Defendant, now moved that the Plaintiff might give the security before the first day of the next term, or that his Bill might be dismissed.

The VICE-CHANCELLOR:—

I am not aware of any authority upon this subject; but it appears to me that if a Plaintiff will not conform to the practice of the Court, the Defendant has a right to have the Bill dismissed. *2d. 284*

Motion granted.

13th May.

Practice.
Witness.

A witness who had answered some of the Interrogatories, but refused to answer the others, was ordered to answer those Interrogatories within four days, or to stand committed.

AUSTIN v. PRINCE.

A WITNESS had answered some of the interrogatories, but refused to answer the others.

Mr. Knight, now moved, upon the Examiner's certificate, that the witness might be ordered to answer the other interrogatories within four days, or stand committed: and the Vice-Chancellor ordered accordingly.

days, or to stand committed.

LEIGH v. LEIGH.

1827.
16th and 23d
May.

Pleading.
Fine.

A Fine and
Non-claim can-
not be pleaded
in bar to a Bill
to prevent the
setting-up of an
outstanding
Term.

192 Mysl. 710.
ante 68. part 393.
See also -
Brown reward
2. Case. 447.

THE Bill, which was filed on the 9th of December 1820, stated that *Edward Lord Leigh*, at the times of making his Will, and of his death, was, or claimed to be, seised of, or otherwise well entitled, in fee, to divers Abbeys, Parks, Manors, Messuages, Farms, Lands, Tenements and Hereditaments situate in the Counties of *Warwick*, *Stafford*, *Bedford* and *Northampton*; and that, being or claiming to be so seised and entitled, he duly made and published his last Will and Testament in writing, bearing date the 11th of May 1767, which was executed and attested as is required by Law for devising Real Estates, and thereby gave and devised, to *William Craven*, Esquire, and to the Reverend *Edward Ludford Taylor*, all his Abbeys, Parks, Manors, Messuages, Farms, Lands, Tenements and Hereditaments in the County of *Warwick*, for the term of 500 years, upon Trust, to raise Money to pay his just Debts and Funeral Expenses and Legacies; and, subject to such term of 500 years, he gave unto and to the use of *Craven* and *Taylor*, and their Heirs, during the Lives of his Sisters, the honourable *Mary Leigh*, and the honourable *Anne Hackett*, wife of *Andrew Hackett*, Esquire, and the longest liver of them, in case he should die unmarried, all his Abbeys, Parks, Messuages, Farms, Lands, Tenements and Hereditaments in the said Counties of *Warwick*, *Stafford*, *Chester*, *Bedford* and *Northampton*, or elsewhere, and all other his Real Estates whatsoever which he should die possessed of, interested in or entitled unto, in Trust to preserve the contingent Remain-

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ders thereinafter mentioned ; also, in case he died unmarried or without children, he gave, devised and bequeathed all the Rents Issues and Profits of all his Abbeys, Parks, Manors, Messuages, Farms, Lands, Tenements and Hereditaments in the same Counties, or elsewhere, subject as aforesaid, unto his Sister *Mary Leigh*, for her Life, and after her decease, unto her first Son and, the Heirs Male of his body, and, for default of such Issue, to all other the Son and Sons of *Mary Leigh*, in Tail Male, successively, according to their seniority, and, for want of such Issue, to the Daughter or Daughters of his Sister *Mary Leigh*, and the Heirs of her or their body or bodies lawfully issuing, to take, if more than one, as tenants in common, and not as joint tenants ; and, for default of such Issue, he gave, devised and bequeathed the same premises, subject as aforesaid, unto the said *Anne Hackett*, during her Life, and, from and after her decease, to her first Son and the Heirs Male of the body of such first Son, and, for want of such Issue, to all the other Son and Sons of the said *Anne Hackett*, in Tail Male, respectively and successively, according to their seniority ; and, for want of such Issue, he gave, devised and bequeathed all his said Abbeys, Parks, Manors, Messuages, Farms, Lands, Tenements, Hereditaments and premises in the said several Counties of *Warwick, Stafford, Bedford, Chester and Northampton*, or elsewhere, and all other his Real Estates which he should die possessed of or interested in, unto the first and nearest of his kindred, being male, and of his name and blood, that should be living at the time of the determination of the several Estates thereinafter limited and devised, and to the Heirs of his body lawfully begotten, and, for want of such Issue, to his own right Heirs forever. He also gave certain Legacies, and appointed

Mary Leigh his Executrix : That the Testator died in or about the month of May 1786, leaving the honourable *Mary Leigh* his Heir at Law : That the said honourable *Mary Leigh* was, under and by virtue of the said Testator's Will, entitled to an Estate for Life in the said devised Estates, subject to the said term of 500 years vested in the said *William Craven* and the Reverend *Edward Ludford Taylor*; and that, shortly after the Testator's death, she entered into the possession and into the receipt of the Rents and Profits of the said devised Estates, and continued in the possession thereof until the time of her death after mentioned : That the said *Anne Hackett* died in the life-time of the said honourable *Mary Leigh* without leaving any issue : That the said *William Craven* and *Edward Ludford Taylor* had long since paid all the Debts and the Legacies mentioned in the Will, for the payment of which Debts and Legacies the said term of 500 years was created ; and that, after payment of such Debts and Legacies, the said *William Craven* and *Edward Ludford Taylor* held the said term in Trust to attend the Inheritance of the said devised Estates comprised in the said term : That the said *William Craven* and *Edward Ludford Taylor* had both departed this life ; and that the Person or Persons in whom the legal Estate of the said Term became vested on the death of the Survivor of them, had assigned the said Term to the Defendant *James Henry Leigh* : That the Honourable *Mary Leigh* had no issue : That she was a Woman of a very weak mind ; and that *James Henry Leigh* and the Reverend *Thomas Leigh*, since deceased, and their Solicitor, *Joseph Hill*, deceased, by undue influence and misrepresentations, procured the said *Mary Leigh*, who was entitled to the Rever-

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sion of the said Estates, to execute a Will, which purports to bear date the 23d December 1786, devising the said Estates as after mentioned: That she, by her said Will, after reciting that by the now existing testamentary Paper she made her last Will and Testament, so far only as concerned all the Freehold and Copyhold Estates, late the Property of her late Brother, *Edward Lord Leigh*, which descended or came to her at his death, either in Possession, Remainder, or Reversion, and so far as she had, by Law or Equity, the Right or Power to devise or dispose of the same, that is to say, she gave and devised all the Freehold Abbeys, Parks, Manors, Lands, Tenements, Tithes and Hereditaments, and all the Copyhold Estates late of her said late Brother, of which he was seised or entitled in Possession or Remainder, Reversion or Expectancy, to *Robert Augustus Johnson*, Esquire, his Heirs and Assigns, to the use of *Joseph Hill*, Esquire, his Executors, Administrators or Assigns, for the Term of One Thousand Years, to be computed from the day of the decease of the Testatrix, but nevertheless in Trust for the purposes thereafter declared concerning the said Term; and, subject to the said term of one thousand years, to the use of the said Reverend *Thomas Leigh*, and his Assigns, for Life, and from and immediately after his decease to the use of *James Leigh Perrott*, and his Assigns, for Life; and, from and immediately after the decease of the Survivor of them the said *Thomas Leigh* and *James Leigh Perrott*, to the use and intent that — *Leigh*, Brother of the said *James Leigh Perrott*, might receive, out of the Rents and Profits of the said Premises, the yearly Rent or Sum of 200*l.*, during his Life, to commence from the death of the Survivor of the said

James Leigh and *James Leigh Perrott*; and, subject as aforesaid, to the use of *James Henry Leigh*, Esquire, and his Assigns, for his Life; and, from and immediately after the determination of that Estate, by forfeiture or otherwise, during the Life of the said *James Henry Leigh*, to the use of *Robert Augustus Johnson* and his Heirs, during the Life of the said *James Henry Leigh*, in Trust, to preserve contingent Remainders thereafter limited; and, from and immediately after the decease of the said *James Henry Leigh*, to the use of the first Son of the body of the said *James Henry Leigh* and the Heirs Male of the body of such first Son, and, for want of such Issue, to the use of the second, third, and fourth, and all and every other the Son and Sons of the body of the said *James Henry Leigh*, successively, as they should be in order of birth, and the Heirs Male of the body and bodies of such Sons successively, with divers Remainders over: That, at the time the Reverend *Thomas Leigh*, *James Henry Leigh*, and *Joseph Hill*, procured the Honourable *Mary Leigh* to execute her said will, they knew that the Plaintiff was entitled, under the limitations in the Testator's Will, to the devised Premises and Estates upon the death of the honourable *Mary Leigh*, in case she should die without leaving any Issue; and that the said Reverend *Thomas Leigh*, *James Henry Leigh*, and *Joseph Hill*, procured the honourable *Mary Leigh* to make her said Will for the purpose of defrauding the Plaintiff of the said devised Estates, and to prevent the Plaintiff from establishing his Title to the same Estates: That the said *Mary Leigh* died on the 2nd of July 1806 without having been married, and without leaving Issue; and that the said *Anne Hackett* having died without Issue in the Lifetime of the honourable *Mary Leigh*,

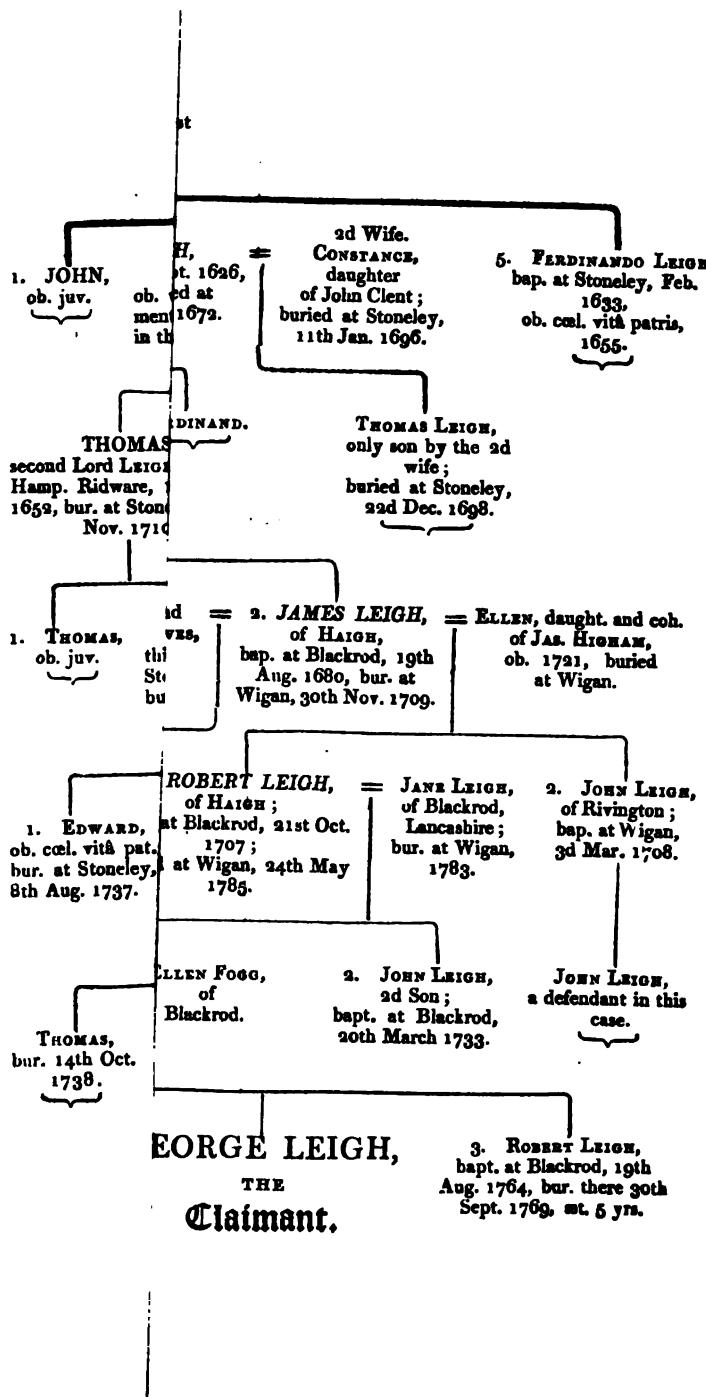
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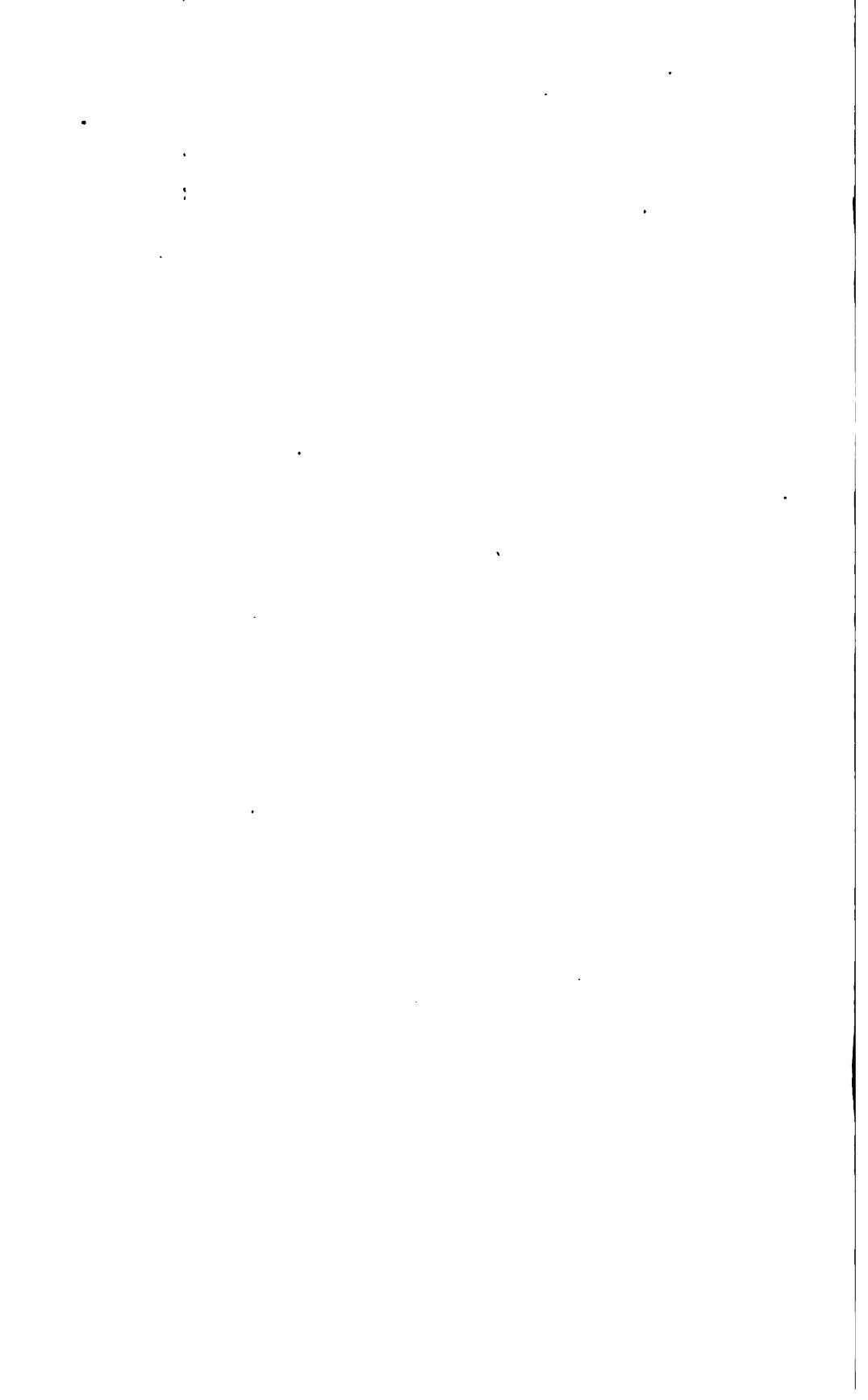
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the said Estates devised by the Testator's Will became, at the death of the honourable *Mary Leigh*, vested, under and by virtue of the limitations contained in the Testator's Will, in the person who then answered the description of the first and nearest of the Testator's kindred, being male, and of his name and blood: That the late Sir *Thomas Leigh*, the first Baron *Leigh*, and one of the ancestors of the Testator, died in the Month of February 1671; and that the said *Thomas*, the first Lord *Leigh*, had five Sons; *John Leigh*, his eldest Son, *Sir Thomas Leigh*, Knight, his second Son, *Charles Leigh*, his third Son, *Christopher Leigh*, his fourth Son, and *Ferdinand Leigh*, his fifth Son; that *John Leigh*, eldest Son of the first Lord *Leigh*, died an Infant, and without having been married; and that Sir *Thomas Leigh*, the second Son, died in the life-time of the said first Lord *Leigh*, but having left one only Son and Heir-at-law, namely, *Thomas*, who upon the death of his Grandfather the first Lord *Leigh*, in 1671, became the second Lord *Leigh*: That the said *Thomas*, the second Lord *Leigh*, had four Sons (that is to say) *Thomas Leigh*, *Edward Leigh*, *Charles Leigh*, and *Lewis Leigh*; and that the said *Thomas Leigh*, *Lewis Leigh*, and *Charles Leigh*, died unmarried, and without Issue: That the said *Thomas*, the second Lord *Leigh*, died in or about the Month of October 1710, leaving his said Son *Edward Leigh*, who thereupon became the third Lord *Leigh*: That the said *Edward*, third Lord *Leigh*, had two Sons (that is to say) *Edward Leigh*, who died unmarried and without Issue, and *Thomas Leigh*, who became, on the death of his Father, which happened in the Month of March 1737-8, the fourth Lord *Leigh*: That the said *Thomas*, fourth Lord *Leigh*, had three Sons (that is to say) *Thomas Leigh* and *Thomas Leigh*,





who both died Infants, and without leaving any Issue; and the Testator *Edward*, who became, on the death of his Father in the Month of November 1749, the fifth Lord *Leigh*: That the said Testator died unmarried, and without Issue, whereupon the Issue Male of the said *Thomas* first Lord *Leigh*, descended from the body of the said Sir *Thomas Leigh*, his second Son, became extinct: That *Charles Leigh*, the third Son of *Thomas*, first Lord *Leigh*, died in the year 1704, without Issue, and that *Ferdinand Leigh*, the fifth Son of the first Lord *Leigh*, also died unmarried and without Issue, in the lifetime of his Father the first Lord *Leigh*: That *Christopher Leigh*, the fourth Son of the first Lord *Leigh*, had three Sons, (that is to say) *Roger Leigh*, his first and eldest Son; *Ferdinand Leigh*, and *Thomas Leigh*; and that the said *Christopher Leigh* died in the month of September 1672: That the said *Roger Leigh*, the eldest Son of the said *Christopher Leigh*, had one Son, namely, *James Leigh*, and that the said *Roger Leigh* died in the year 1702: That the said *James Leigh* had Issue *Robert Leigh*, his Son and Heir-at-law; and that the said *James Leigh* died in the year 1709: That the said *Robert Leigh* had Issue *James Leigh*, his Son and Heir-at-law; and that the said *Robert Leigh* died, in May 1785: That the said *James Leigh* had Issue the Plaintiff; and that the said *James Leigh* died in the Month of May 1788; and that the Plaintiff was the first and nearest of the Testator's kindred, being male and of his name and blood, and that was living at the death of the honourable *Mary Leigh*; and that the Plaintiff then became and was entitled to the said devised Estates, as Tenant in Tail thereof, under and by virtue of the Testator's Will: That the honourable *Mary Leigh* having devised the Estates by her Will as aforesaid, the Reverend

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Thomas Leigh in her Will named, entered into possession of the Estates, and received the Rents thereof, and continued in such possession for about four years, when the last-named *Thomas Leigh* delivered up the possession of the devised Estates to *James Henry Leigh*, to whom the honourable *Mary Leigh* devised the Estates for his Life as aforesaid ; and that *James Henry Leigh* had ever since been and then was in the possession of the devised Estates, or in the receipt of the Rents and Profits thereof: That the Reverend *Thomas Leigh*, *James Leigh Perrot*, and — *Leigh* his Brother, have departed this life: That *Joseph Hill*, to whom the honourable *Mary Leigh* devised the said Estates for a term of 1000 years, was dead ; and that he had made his Will, whereof he appointed *Hill Mortimer*, Executor, and who claimed to have an interest in the devised Estates, in respect of the term of 1000 years, as *Hill's* personal Representative: That *James Henry Leigh* was descended from one of the brothers of the Grandfather of *Thomas* the first Lord *Leigh*: That *James Henry Leigh* was married, and had Issue a Son, named *Chandos Leigh*, who claimed, under the limitations contained in the Will of the honourable *Mary Leigh*, to be entitled to an Estate-tail in the Estates devised by the Testator *Edward Lord Leigh*, expectant on the death of *James Henry Leigh*: That *James Henry Leigh* had, since he had been in possession of the devised Estates, received the Rents to the amount of 500,000 *l.*, and cut down and used a large quantity of Timber on the Estates ; and that he had removed the Monument of *Christopher Leigh* from the Church at *Stoneleigh*, and carried away, concealed or destroyed, divers Family Memorials, &c. which would have been Evidence of the Plaintiff's Pedigree ; and that *James Henry Leigh* had

in his custody divers Deeds, &c., by which it would appear that the Plaintiff was entitled to the devised Estates: That the Plaintiff had not, until very lately, been able to procure Evidence of his relationship to the Testator, and of his Title to the devised Estates, by reason of *James Henry Leigh* destroying and concealing such Evidence; and that *James Henry Leigh* had prevailed upon Persons, in whom the legal Estate of the term of 500 Years was then vested, to make an Assignment of the Term to or in Trust for him; and that the Defendants threatened, in case the Plaintiff should proceed at Law to recover Possession of the devised Estates comprised in the term, to set up the term of 500 Years, in order to defeat the plaintiff from trying his Title to the devised Estates.

The Bill prayed that the Defendants might make a discovery of the matters aforesaid; and might be restrained from setting up the term of 500 years; and that *James Henry Leigh* might be also restrained from cutting down any Timber Trees upon the devised Estates.

On the 17th of May 1821, the Defendant, *Chandos Leigh*, put in a plea to the Bill, by which he averred that *Edward Lord Leigh* was not, and did not claim to be, at the time of his death, seised, or otherwise well entitled in fee, to any Freehold Abbeys, Parks, Manors, Messuages, Farms, Lands, Tenements or Hereditaments, in the Counties of *Suffolk* and *Northampton*, or either of them, or elsewhere, other than in the Counties of *Warwick*, *Leicester*, *Stafford*, *Bedford*, *Buckingham* and *Chester*: That, in and prior to the month of November 1806, the Reverend *Thomas Leigh*

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was seized in possession of the Freehold Estates or Hereditaments after described, situate in the Counties of *Warwick, Leicester, Stafford, Bedford, Buckingham and Chester*, which were the only Freehold Abbeys, Parks, Manors, Messuages, Farms, Lands, Tenements, and Hereditaments whereof *Edward Lord Leigh* was, or claimed to be, seized or well entitled in fee at the time of his death: That the said *Thomas Leigh* being so seized, he and *James Leigh Perrot* and the Defendant, *James Henry Leigh*, executed Indentures of Lease and Release, bearing date respectively the 3d and 4th days of November 1806, the Indenture of Release being made between the Reverend *Thomas Leigh*, *James Leigh Perrot*, and *Jane* his Wife, the Defendant *James Henry Leigh* and the honourable *Julia Judith*, his Wife, of the first part, *George Kinderley* and *William Domville*, of the second part, and *Joseph Hill* and *Thomas Graham*, of the third part, whereby, after reciting that *Mary Leigh* had made her Will, whereby she gave certain Hereditaments therein described to the use of *Robert Augustus Johnson*, his Heirs and Assigns, to the use of the said *Thomas Leigh*, and his Assigns, for his Life, with remainder to the use of *James Leigh Perrot*, and his Assigns, for Life, with Remainder, after the decease of the survivor of *Thomas Leigh* and *James Leigh Perrot*, to the intent that *Leigh*, brother of *James Leigh Perrot*, might receive, out of the Rents, the yearly sum of 200*l.*, and, subject thereto, to the use of *James Henry Leigh*, and his Assigns, for his life; with remainder to the use of *Robert Augustus Johnson* and his Heirs, during the Life of the said *James Henry Leigh*, in trust to preserve contingent Remainders; with Remainder to the use of the first and other Sons of *James Henry Leigh*, successively, in

Tail-male, with divers Remainders over, with the ultimate Remainder or Reversion to the use of the Heirs Male of *Mary Leigh*: It was witnessed that *Thomas Leigh, James Leigh Perrot*, and the Defendant *James Henry Leigh*, conveyed to *Kinderley and Domville*, and their Heirs, all the Manors and other Hereditaments situate in the six last-mentioned Counties, which were formerly the Estate of Freehold and Inheritance of *Edward Lord Leigh*, deceased, and since of *Mary Leigh*, or whereof or wherein *Thomas Leigh and James Leigh Perrot* and the Defendant *James Henry Leigh*, had any Estate of Freehold and Inheritance in Possession, Reversion, Remainder or Expectancy, under the therein-recited Wills, or either of them: And they covenanted to levy, to *Kinderley and Domville*, six Fines *sur conuance de droit come cœ*, &c. with Proclamations of such of the Hereditaments comprised in the Indenture of release as were Freehold of Inheritance, to the intent that *Kinderley and Domville* might become Tenants of the Freehold and Inheritance of the same Hereditaments, in order that six common Recoveries might be thereof suffered, in which Recoveries *Thomas Leigh, James Leigh Perrott*, and the Defendant *James Henry Leigh*, were to be vouched, and were to vouch over the common vouchees: And it was declared that the Indenture of Release, Recoveries and Fines, should enure to such Uses, upon and for such Trusts, Intents and Purposes, and with, under and subject to such Powers, Provisos, Declarations and Conditions as were expressed and declared concerning the same by the therein-recited Will of *Mary Leigh*, and for the purpose of confirming the Devises and Limitations, contained in that Will, concerning the Freehold Estates thereby devised. The Plea further averred that in 47th Geo. 3. the

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Fines were levied accordingly; and that in the same year five common Recoveries were suffered, as agreed by the Indenture of Release, of such of the Hereditaments as were situate in the Counties of *Warwick*, *Leicester*, *Stafford*, *Bedford*, and *Buckingham*: And that, prior to July 1812, the Defendant, *James Henry Leigh* purchased from *James Leigh Perrott* all the Interest of the said *James Leigh Perrott* in the said Hereditaments comprised in the Indentures of Lease and Release; and that *James Leigh Perrott* duly conveyed to the Defendant *James Henry Leigh* all his Interest in the said Hereditaments and Premises accordingly: That the Defendant *Chandos Leigh* attained his age of twenty-one Years prior to the Month of July 1812; and that, by Indentures of Lease and Release, dated the 30th and 31st of July 1812, the Release being made between the said *Thomas Leigh*, the Defendant *James Henry Leigh*, and the Defendant *Chandos Leigh*, of the first part; *Kinderley* and *Domville*, of the second part; and *Thomas Graham* and *William Bentham*, of the third part; the Parties of the first part conveyed, to the Parties of the second Part and their Heirs, such parts of the said Hereditaments as were situate in the county of *Chester*, to make them Tenants to the Freehold and Inheritance of the same Premises, in order that a common Recovery might be thereof suffered in the Court of Common Pleas at *Chester*, which should enure to such uses as *Thomas Leigh*, the Defendant, *James Henry Leigh*, and the Defendant *Chandos Leigh*, should in manner therein mentioned appoint, and, in default thereof, to the use of *Thomas Leigh*, for Life, with Remainder to such Uses as the Defendant, *James Henry Leigh*, and the Defendant, *Chandos Leigh*, should in manner therein mentioned appoint; and, in default

thereof, to the use of the Defendant, *James Henry Leigh* for Life, and, after his decease, to such Uses as the Defendant, *Chandos Leigh*, after the deaths of *Thomas Leigh*, and the Defendant *James Henry Leigh* should in manner therein mentioned appoint, and, in the mean time, to the Use of the Defendant *Chandos Leigh*, in Tail general, with Remainder to the Use of the right Heirs of the Defendant, *James Henry Leigh*: That a common Recovery was suffered in pursuance of the last-mentioned Indenture: That, for further perfecting the title of *Thomas Leigh* and the Defendants, *James Henry Leigh*, and *Chandos Leigh*, to the said Hereditaments (amongst others) Indentures of Lease and Release, dated the 4th and 5th days of November, 1812, made between the Rev. *Thomas Leigh*, of the first part, the Defendant, *James Henry Leigh*, of the second part, the Defendant, *Chandos Leigh*, therein described as being (as he averred in fact he was) the only Son and Heir Apparent of the Defendant *James Henry Leigh*, of the third part, *Kinderley and Domville*, of the fourth part, *Graham and Bentham*, of the fifth part, and *George Talbot*, the Rev. *Theophilus Leigh Cook*, and *Edward Hyde East*, Esq., of the sixth part, It was witnessed, that *Thomas Leigh*, the Defendant, *James Henry Leigh*, and, the Defendant *Chandos Leigh*, and by their direction, *Thomas Graham*, conveyed to *Kinderley and Domville* the Hereditaments and Premises in the Counties of *Warwick*, *Leicester*, *Stafford*, *Bedford* and *Buckingham*, to make them Tenants of the Freehold and Inheritance of the same, in order that five common Recoveries thereof might be had: And, by the same Indenture, *Thomas Leigh*, the Defendant *James Henry Leigh*, and the Defendant *Chandos Leigh*, appointed that the Hereditaments in the county of *Chester*, com-

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prised in the Indentures of the 30th and 31st of July 1812, and the Recovery, should enure to the Uses and Trusts in the Indenture of the 5th November 1812, mentioned: And it was thereby declared that, after the suffering of the common Recoveries as well the last-mentioned Indenture, as the Recoveries and all other Fines and Assurances had or to be had of the same Hereditaments, should enure, and also that as well the Indentures of the 30th and 31st of July 1812, and the Recovery suffered in pursuance thereof of the Hereditaments in the county of *Chester*, as also the aforesaid appointment of the same Premises, and all Fines, Conveyances and Assurances whatsoever, theretofore had or thereafter to be had, of the same Hereditaments, should enure to such Uses and Estates as *Thomas Leigh*, the Defendant *James Henry Leigh*, and the Defendant *Chandos Leigh*, should jointly appoint; and, in default thereof, to the Use of *Thomas Leigh* for his Life; with Remainder to such Uses as the Defendants *James Henry Leigh*, and *Chandos Leigh*, after the death of *Thomas Leigh*, should in manner in the same Indenture mentioned jointly appoint; and in the mean time to the Use of the Defendant *James Henry Leigh* for Life; with Remainder to the Use of *Kinderley* and *Domville* and their Heirs, during the Life of the Defendant *James Henry Leigh*, upon Trust, to preserve contingent Remainders; and, after the decease of the Survivor of *Thomas Leigh*, and the Defendant *James Henry Leigh*, to such Uses as the Defendant *Chandos Leigh*, in case of his surviving *Thomas Leigh* and *James Henry Leigh*, should, in manner in the same Indenture mentioned, appoint; with Remainder to the Use of the Defendant *Chandos Leigh*, in Tail Male; with Remainder to the Use of the second and other

Sons of the Defendant *Chandos Leigh* successively in Tail Male, with Remainder to the Use of his Daughters successively in Tail Male; with Remainder to the Use of such one or more of the Daughters of the Defendant *James Henry Leigh*, as he should appoint; and in default of appointment, to the Use of the first and other Daughters of the Defendant *James Henry Leigh*, in Tail general; with Remainder to the Use of the Defendant *Chandos Leigh* and his Heirs. The Plea further averred that, in pursuance of the last-mentioned Indenture of Release, five Recoveries were suffered, in Michaelmas Term 1813, of the Hereditaments situate in the Counties of *Warwick, Leicester, Stafford, Bedford, and Buckingham*, in which *Thomas Leigh*, and the Defendant *James Henry Leigh*, and the Defendant *Chandos Leigh*, were vouched, and vouched over the common Vouchees: That *Thomas Leigh* died in the year 1813; and that, by force of the said Fine, with Proclamations and other Assurances, *James Henry Leigh* had, ever since the death of *Thomas Leigh*, been and then was seised in possession of the Hereditaments in the Counties of *Warwick, Leicester, Stafford, Bedford, Buckingham and Chester*: That, to the best of his, the Defendant *Chandos Leigh*'s, belief, the Plaintiff was at the time the said fines were levied of the age of twenty-one years, and *compos mentis*, and at large, and out of prison, and within the four seas; and that the Plaintiff did not, within five years of the Proclamations made upon the said fines respectively, and which were duly had and made according to the forms of the statutes in those cases made, or at any time after, otherwise than by his bill, and which was filed on or about the 13th of October 1820, prosecute any claim to the said premises, or any part thereof, by action or otherwise; so that the Plaintiff

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was barred of all claim to the said premises, by force of the fines with Proclamations thereupon and non-claims as aforesaid, as also by force and virtue of the several other conveyances and assurances before mentioned : wherefore the Defendant pleaded the several matters before mentioned in bar to so much of the bill as sought relief or discovery in respect of the Freehold Lands and Hereditaments in the bill mentioned, other than Freehold Lands in the Counties of *Suffolk* and *Northampton*. And, as to so much of the Bill as prayed relief or discovery in respect of any Copyhold Tenements, the Defendant pleaded in bar thereto, and averred that *Edward Lord Leigh* at the time of his death did not claim, and was not seised of, or otherwise well entitled to, any Copyhold Tenements, which he had surrendered to the use of his Will : and, as to so much of the Bill as prayed any relief or discovery in respect of any Real Estate, not being Freehold or Copyhold, the Defendant pleaded in bar thereto, and averred that *Edward Lord Leigh*, at the time of his death, did not claim, and was not seised of, or otherwise well entitled, in fee, to any Real Estate not being Freehold or Copyhold.

Mr. *Horne*, Mr. *Shadwell*, and Mr. *Koe*, in support of the Plea :—

The question between the parties is entirely a legal one, except as to the right to remove the outstanding term. The defence is a Fine with Proclamations, as a bar to the Title of the plaintiff ; and it cannot be denied that a Fine with Proclamations must, in all cases, be a complete and absolute bar to all legal Title that the Plaintiff can assert ; and, therefore, to any species of relief that this Court can give. If the legal Title is gone, this Court will not remove a term. *Lord Redesdale* says :

“ A plea of a Fine and Non-claim, though a legal bar, is equally good in Equity, provided it is pleaded with proper averments,” (a).

The VICE-CHANCELLOR :—

As at present advised, I am of opinion that this plea can not be supported. The Bill is filed by a person claiming Title at Law to the Estates of the late Lord *Leigh*. Lord *Leigh*, by his Will, created a term of 500 years, for the purpose of raising money for payment of his Debts, Legacies, &c.; and, subject to that term, made legal limitations of his Estates, which we may consider as determined, unless the Plaintiff is entitled under one of them. Sufficient is stated in the Bill to show that the plaintiff has a colour of Title to the Estates. The Plaintiff states that the term is satisfied, and accounts for the extinction of all the intermediate Limitations; and he also states that he is desirous of trying his title at Law, but that, by reason of the outstanding Term, he is unable to go to trial. It is a clear principle that, if there is a Term prior to legal Limitations, and the purposes of the term are satisfied, the Termor is a Trustee for the person who under the legal Limitations is entitled to the Estate. Now the Plaintiff asks no relief, except that the Termor shall not be permitted to interpose the Term to prevent the trial of the legal question, whether, under the Limitations of the Will, the Plaintiff is entitled to the Estates. The Defendant in this Case has pleaded fines and recoveries and possession under them for a sufficient time to bar the Plaintiff's claim. Now, if the fines and recoveries have produced the intended effect, the Termor is a Trustee for the Defendant; but if not, a Court of Equity is

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bound to say to the Termor that, as between two persons claiming an Estate by a legal Title, he shall stand neuter. The Bill asks no other relief than to prevent the Assignee of the Term, who is, as it were, a stakeholder, from interposing to prevent the trial of the real right. The Defendant at the trial of the ejectment may plead the Fines and non-claim. But a Termor is always a Trustee for the real owner of the Estate; and a Court of Equity will always prevent him from setting up the term. If the Bill had prayed for delivery of possession, an account of rents and profits, or any other species of Equitable relief, I should have considered whether the plea contained a sufficient legal defence.

Argument for the Defendant continued:—Those who set up the Fine and non-claim have got a good Title against all the world except those who claim under the term. But your Honor's observations would make it impossible for a person who had levied a Fine to avail himself of it in any case where there is a term. The creation of this term is referred to a person who was, or claimed to be, seised in fee. It amounts only to an allegation that there was or was not a term. Besides, the Bill states that the term has been assigned to *James Henry Leigh*; now, as he is seised of the Freehold, the term is merged, and therefore no such term now exists. [The *Vice-Chancellor* :—If that be so, you cannot be prejudiced by having the term removed].—A plea of the Statute of Limitations has been allowed to a bill for discovery, and to prevent the setting up of outstanding terms, on the ground that the Statute was a good defence at Law. *Jerny v. Best* (b). And, on the same principle, pleas of other matters have been allowed to Bills of

(b) See post. 373.

discovery, *Sutton v. Earl of Scarborough* (c), *Baillie v. Sibbald* (d), *Mendizabel v. Machado* (e), and *Gait v. Osbaldeston* (f).

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Mr. Sugden, and Mr. Treslove, for the Plaintiff:—

Where a Bill is filed for discovery and not for relief, the Defendant cannot plead matter which would be a good defence at Law. *Hindman v. Taylor* (g) decides the very point. If, where the plaintiff in a Bill of discovery states that he is trying to establish his Title before another Court, which is the proper tribunal for deciding upon his claims, a Court of Equity were to allow the Defendant to plead matter which would be a good defence at Law, it would then have to determine as to the sufficiency of the legal defence, and would take upon itself the decision of a legal question. If the Court were to allow this plea, it would have to enter into the discussion of the operation of these fines; and it would not decide upon the subject without taking the opinion of a Court of Law; and would thus do indirectly, what the Plaintiff seeks in the first instance.

Mr. Koe, in reply:—

The Case of *Hindman v. Taylor* has been over-ruled by *Mendizabel v. Machado*. The *Lord Chancellor's* decision in *Gait v. Osbaldeston* is peculiarly applicable to the present Case.

The VICE-CHANCELLOR:—

The Case, stripped of technicalities, is this: Lord Leigh, being seised in possession of Estates in various

(c) 9 Ves. 71. (d) 15 Ves. 185. (e) *Ante*, 68.

(f) 5 Madd. 428, over-ruled on appeal by Ld. Eldon, C. 1 Russ. 158.

(g) 2 Bro. C. C. 7.

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Counties, devised them to Trustees for a term of years for payment of his Debts and other purposes, which have been all satisfied; and, subject to the term, he gave those Estates to certain individuals for their Lives, and to their Issue-male, after their deaths; and, on failure of those Limitations, to the person who should answer the description of the first and nearest of his kindred, being male, and of his name and blood. The Plaintiff alleges that all the prior Limitations are spent; and that he is the person who answers this description, and is therefore now entitled to the Estates: and all the relief he asks is, that he may not be prevented, by any use that may be made of the term, from asserting his title at Law; and he therefore prays that the Defendant may be restrained from setting up the term in bar of any action of ejectment that he may bring.

I had apprehended that it was one of the principles of a Court of Equity that, wherever the owner of an Estate creates a term for particular purposes and limits his Estate in a series of devises to certain individuals, whoever is possessed of the term after the purposes are answered is a Trustee for those who are then entitled to the Estate so devised: and that, whether *A.* or *B.* is entitled, the termor is a stakeholder between the two; and, when it is decided which of the two is entitled, the termor is a Trustee for the person in whom the Court of Law has determined that the Estate is vested.

Upon the present record it must be taken as true that the plaintiff is the person who, under the limitations of this Will, is entitled to recover at Law; and that the Defendant is in possession adversely to the Plaintiff, and seeks to protect his possession by means of the term. The Defendant, having admitted these facts,

sets up this defence ; that, being in possession of the Estates, he had levied Fines of them ; that the five year's non-claim had run ; and that the plaintiff, at the time when the fines were levied, was under no legal disability, and, consequently that the Defendant has acquired a new and distinct Title, which enables him to defeat the Plaintiff at Law, and to call upon a Court of Equity to decide whether it ought to give the Plaintiff any relief with a view to assist him to try his Title at Law. This is a singular mode of dealing with the jurisdiction of a Court of Equity ; for, if the Court were to take cognizance of the question, whether these Fines and non-claim are, or are not a bar, the consequence would be, if on argument it appeared that they are vicious and no bar, that the plaintiff, on the plea being over-ruled, would have to go again into a Court of Law, and to try the question a second time. But, if the plaintiff took issue on the plea, many facts might be proved to nullify the plea. The Plaintiff might be able to show, by extrinsic matter, that the plea was good for nothing, as, for instance, by proving that there had been an entry within the five years ; that the plaintiff was under age when the fines were levied ; that there had been fraud in levying them, or that there were no proper tenants to the *præcipe* when the Recoveries were suffered : and having proved all these facts in a Court of Equity, that Court would have only to turn the plaintiff back to re-agitate all these questions in a Court of Law, where they must ultimately be decided. I had long impressed my mind with a notion that, to this species of Bill, this defence could not be set up ; but it does not follow that no defence will hold. I am surprised to find that there is so little of positive authority upon the subject. Lord Redesdale says : " Courts of Equity, in many cases, will

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act as ancillary to the administration of justice in other Courts, by removing impediments to the fair decision of a question. Thus if an ejectment is brought to try a right to Land in a Court of Common Law, a Court of Equity will restrain the party in possession from setting up any title which may prevent the fair trial of the right, as a term for years, or other interest in a Trustee, Lessee, or Mortgagee (a)".

1 Proof. 158

It was said, in the argument, that if this plea were not allowed, there would be no case in which such a defence could be set up. Now Lord *Redesdale* states cases in which this defence would be available; for he goes on to say: "But this will not be done in every case; for as the Court proceeds upon the principle that the party in possession ought not, in conscience, to use an accidental advantage to protect his possession against a real right in his adversary, if there is any circumstance which meets the reasoning upon this principle the Court will not interfere. Therefore, if the possessor is a purchaser for a valuable consideration, without notice of the Title of the claimant, this is a Title, in conscience, equal to that of the claimant, and the Court will not restrain the possessor from using any advantage he may be able to gain to defend his possession. It can hardly appear, upon the face of a bill, that the Defendant is in such a situation, and therefore the benefit of this defence must generally be taken by plea; but if the case should be so stated, the defendant might demur; because the case stated would appear to be such in which a Court of Equity ought not to assume jurisdiction (b)."

(a) *Treat. Plead.* 108.(b) *Ibid.*

There is another part of this treatise which, by inference, affirms the proposition which I have laid down. In speaking of what Pleas may be put in to Bills, the author says: " If the judgment of a Court of ordinary jurisdiction has finally determined the rights of the parties, the judgment may, in general, be pleaded in bar of a Bill in Equity. Thus, where a bill was brought by a person claiming to be Son and Heir of *Joscelin Earl of Leicester*, and alleged that the Earl, being tenant in Tail of Estates, had suffered a recovery, and had declared the use to himself and a Trustee in fee; and that the plaintiff had brought a writ of right to recover the lands, but the Defendant had possession of the Title-deeds, and intended to set up the legal Estate which was vested in the Trustee; and prayed a discovery of the Deeds, and that the Defendant might be restrained from setting up the Estate in the Trustee; the Defendant pleaded, as to the discovery of the Deeds and relief, judgment in her favour in the writ of right; and averred that the Title in the Trustee, which the bill sought to have removed, had not been given in evidence; and the Plea was allowed (c)."

The meaning of Lord *Redesdale* is, that, if the party whose Title to an Estate is disputed has conveyed the property to himself and a Trustee, and the legal Estate is, by survivorship, in the Trustee, the Court would prevent that Estate from being set up in bar of the action. He then goes on to show that the interposition of the Court was unnecessary in the Case cited, as the writ of right had been tried, and the Estate not set up. These passages are all that I can find upon the subject.

(c) *Treat. Plead.* 206.

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There is a Case not reported, which came first before Sir *W. Grant*, and afterwards before Lord *Eldon*; I mean *Allen v. Gwynne*. The Bill was filed by *Allen*, who represented himself to be entitled by descent to an Estate of which the Defendant was in possession by means of a Will fraudulently obtained from the Plaintiff's ancestor: and it charged fraud and misconduct in those who procured the Will, and also that they had by means equally fraudulent procured a Deed which disinherited the Plaintiff, and that the Person in possession had levied a Fine: and the Bill prayed that the Defendants might be restrained from setting up the Fine. In that Bill the peculiarity was, that it did not aver that there was any outstanding term; but, after praying for the relief, a few words were added, praying that the Defendants might be restrained from setting up any out-standing terms. The Defendants, in their Answer insisted on the Fine and Non-claim as a bar. The Case came before Sir *W. Grant*. I was Counsel for the Plaintiff, and, in the result, obtained this decree, that the Case should stand for a twelve-month, with permission to the Plaintiff to bring an ejectment to try his Title at Law, and the Defendants were not to set up any outstanding terms. I think that Sir *Samuel Romilly* did not object to the form of the Record, as to the outstanding terms, and probably he thought a trial at Law, at once, most beneficial to his Client. Sir *W. Grant*, however, would not interfere to prevent the Defendant from availing himself of the Fine at Law. This is, substantially, a decision in the present Case; for there was in that Case what was, in substance, a Plea of a Fine and Non-claim. The Plaintiff in that Case afterwards appealed to Lord *Eldon*; and I sup-

ported the Appeal unsuccessfully. This is all the authority I have been able to find upon the question.

My opinion is, that this peculiar species of Bill does not admit of this peculiar species of Defence by Plea. It is on this ground that I overrule the Plea.

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JERMY v. BEST. (*)

1819.
5th May.Pleading.
Statute of Limitations.

THE Bill prayed that the Defendants, who were in possession of certain Estates in Norfolk, to which the Plaintiff claimed to have become entitled by the vesting in possession of the ultimate Remainder created by the Will of the late *William Jermy*, Esq. might be restrained from setting up an old out-standing term to defeat the Plaintiff in an Action of Ejectment, which he alleged he intended to bring against them, to recover possession of the Estates. The Defendants pleaded the Statute of Limitations, and averred that the Right or Title of the Plaintiff to the Lands and Hereditaments in the Bill mentioned, accrued, if at any time, above twenty years before the Plaintiff commenced the proceeding at Law in the Bill mentioned, for the recovery of the possession of the Lands and Hereditaments, and before the Plaintiff exhibited his Bill of Complaint; and that the Plaintiff had not, nor had any person for him, or in his name, made any entry or claim upon the Lands and Hereditaments within twenty years after the time when the Plaintiff's title was *alleged* to have accrued, and

The Statute of Limitations may be pleaded in bar to a bill to prevent the setting up of outstanding terms.

*ante 349
2 Sim 452.
19th May. 690*

* By the kindness of Mr Blenman the Reporter has been furnished with the above note of this case, which is cited *ante*, 366.

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within one year next before any such Action or Suit as aforesaid was commenced or instituted, and prosecuted with effect by the Plaintiff according to the Statute in that behalf made and provided; and that the Plaintiff was not, at the time when his right of entry upon the Lands and Hereditaments *was alleged* to have first accrued, within the age of twenty-one years, *non compos mentis*, imprisoned, or beyond the seas.

Mr. *Pemberton*, in support of the Bill, stated the questions to be, first, Whether the Statute of Limitations could be pleaded at all in such a Case as the present; secondly, whether it was in this Case pleaded with proper averments.

The Statute cannot be pleaded in this Case, because the question of title between the parties is one which ought properly to be tried at Law, and the Statute would be a good defence at Law. The effect therefore of allowing the plea, would be unnecessarily to withdraw the subject of contention between the parties from the proper jurisdiction. And as the validity of the plea, as a bar to the Suit, depends upon the matters of fact, such as the non-entry within twenty years, and what regards the disability of the Plaintiff, the Court may ultimately have to direct an Issue upon one or more of those questions of fact; in other words, it would be to be tried at Law, whether the Plaintiff was to be at liberty to proceed in his Action. So that there may be ultimately two trials at Law, the first to try the truth of the Plea, and if the Plea be disproved, the trial of the Ejectment.

Secondly, As to the form of the Plea: It is not averred that there has been an adverse possession against the

Plaintiff; and this is the very substance of such a Plea; and every thing necessary to make the Plea a complete distinct defence ought to be distinctly averred.

The averment: "that neither the Plaintiff, nor any person for him has entered within twenty years after the time when the Plaintiff's title is alleged to have accrued" is defective, because it puts in Issue, not the time when Plaintiff's title accrued, but the time when it is alleged to have accrued, which is an immaterial Issue.

The VICE-CHANCELLOR (a):—

The Plaintiff seeks by his Bill the assistance of this Court in order to enable him to assert a legal title. The only ground for equitable relief is, that he may proceed at Law with effect. But if it is clear that, when he has obtained the equitable relief which he seeks, he will nevertheless be unable to proceed at Law, the only ground for equitable relief fails.

This is not like the Case of *Hindman and Taylor* (*b*), which was only a Bill of discovery; to which, it was there held, you cannot plead the Statute of Limitations. This is a Bill for relief, to which the principle of that Case does not apply. The Plea in this Case does the proper office of a Plea, by bringing forward fresh matter, which, if true, is a bar to the Plaintiff's equity.

With regard to the objections of form, it is not necessary that the Plea should aver that the Plaintiff has

(a) *Sir J. Leach.* (b) *a Bro. C. C. 7.*

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been out of possession ; because the Bill admits it. The Plea is not an independent record, but must be looked at with reference to the Bill ; when, therefore, the Plea avers that no entry has been made within twenty years after the time when the Title is alleged to have accrued, I must look to the Bill to see when it is there alleged to have accrued, which I find to be at the time of the death of the last Tenant for Life, this therefore brings it to the time when the Plaintiff's title did accrue, if at all.

The Plea must be allowed.

Reg. Lib. A. 1818, fol. 951.

8th May.

Partnership.

If a Partner borrows a sum of Money, and gives his own Security only for it, it does not become a Partnership Debt by being applied for Partnership purposes, with the knowledge of the other Partner.

Commission of Bankrupt.—No objection can be taken to the validity of a Commission of Bankrupt, unless the requisite Notice be given, although the objection appears upon the Proceedings, and requires no Evidence to support it.

Practice.—A Defendant in a suit by the Assignees of a Bankrupt can not object to the Bill as not having been filed with the consent of the Creditors, unless the objection is made by the Answer.

BEVAN v. LEWIS.

STOKES v. WHITTAKER.

THE Bill stated that, by the Articles of Partnership between the Plaintiff *Bevan* and the Defendant *Lewis*, dated the 29th of March 1823, they agreed to become Partners, as Linen-drapers, for six years, from the 29th of March then next : That the trade should be carried on at *Lewis's* Shop in *Holborn* : That, for the purpose of forming a Capital for carrying on the business, *Lewis* should bring into the Partnership 500*l.*, including what he had expended in purchasing the Premises and fitting up the Shop : That neither of the partners should, with-

out the consent of the other, draw or accept any Bill of Exchange, or Promissory Note, or contract any Debt on account of the Partnership, except in the regular course of business, or assign over his share of the Partnership effects, or become bail or security for any person, or do any act by which the Partnership effects might be seized or taken in execution: That, if either of the Parties should act contrary to the Articles, the other should be at liberty to dissolve the Partnership, by giving notice in writing to the offending partner; and that, at the expiration or other sooner determination of the Partnership, the Partnership Debts should be paid, the Capital of the Partners repaid with interest, and the clear surplus of the Monies belonging to the Partnership be equally divided between the Partners. The Bill further stated that the Partnership was entered upon pursuant to the provisions of this Indenture: That *Lewis*, unknown to the Plaintiff, executed a Warrant of Attorney, dated the 24th of December 1822, to confess judgment against him, *Lewis*, in K. B. at the Suit of the Defendant *Siely*, for 500*l.* and interest: That since the formation of the Partnership, *Lewis*, contrary to the Articles, had executed a Warrant of Attorney, dated the 9th of August 1823, to confess judgment against him in the same Court, at the Suit of the Defendants *Siely* and *Cubitt*, for 500*l.* and interest: That judgments had been entered up on these Warrants of Attorney, and Writs of *fi. fa.* sued out upon them: That the Defendants, *Whittaker* and *Laurie*, the Sheriff of *Middlesex* had, by virtue of the Writs, entered upon the Partnership Premises, and seized a considerable part of the Stock and Effects, and had proceeded to sell some part thereof, and intended to sell the remainder, and to seize the other parts of the Partnership Property,

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and to sell the same, and to pay over the proceeds to *Siely* and *Cubitt* to the injury of the joint Creditors of the Partnership: That the Partnership Property having been taken in execution as aforesaid, the Plaintiff had given *Lewis* notice in writing, declaring the Partnership to be dissolved: That *Lewis* was largely indebted to the Plaintiff: That the Stock and Effects of the Partnership ought to be sold, the proceeds applied in payment of the Partnership Debts, and the surplus divided between the Plaintiff and *Lewis*: That *Siely* and *Cubitt* were not entitled, under the executions, to seize the Stock and Effects, nor had they any interest therein, except in *Lewis*'s share of the surplus aforesaid. The Bill prayed for the usual Partnership Accounts: That the stock and effects might be sold, and the produce applied in payment of the Debts of the Partnership: that the Plaintiff's share of the surplus might be paid to him: That *Siely* and *Cubitt* and the Sheriff might be restrained from proceeding in the executions, and selling the Stock and Effects, and paying over the proceeds of the part already sold to *Siely* and *Cubitt*: That a Receiver might be appointed; and that the Sheriff might be ordered to pay over to him the Money collected under the executions, and to deliver to him the Stock and Effects which had been seized and remained unsold.

The Supplemental Bill stated that the Partnership Property had, by Accounts which had been taken, been found deficient to answer the debts, by 2,000 and upwards: That, on the 27th of August then last, a Commission of Bankrupt had been issued against *Lewis* and *Bevan*, under which they had been declared Bankrupts, and the Plaintiff appointed their Assignees. It prayed

that the proceeds of the Stock and Effects, which had been sold by the Sheriff, might be paid to the Plaintiffs, the Assignees, for the purpose of their being applied to the payment of the joint Debts of the Co-partnership.

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The Defendants *Siely* and *Cubitt*, in their Answer to the Original and Supplemental Bills, said that the first-mentioned Sum of 500*l.* was lent by *Siely* to *Lewis* on the 24th of December 182*2*; and that part thereof, amounting to 350*l.* was applied by *Lewis* in the purchase of the Lease of the Premises upon which *Lewis* was then about to carry on the business of a Linendraper and upon which he and *Bevan* afterwards carried on the same business in partnership; but that the Lease was taken in *Lewis*'s name only: That *Bevan* advanced no part of the Capital of the Partnership: That he had become, and was well aware of *Lewis*'s having borrowed the 500*l.* of *Siely*, and given the Promissory Note and Warrant of Attorney for securing it: That he also knew how *Lewis* had applied the 500*l.* or at least the 350*l.* part thereof: That *Lewis* and *Bevan* having occasion for an advance of Money, *Lewis*, at the request and instance of *Bevan*, as the Defendants had been informed and believed, and with his express authority to give any security for the re-payment thereof that might be required, applied to the Defendants *Siely* and *Cubitt* for the loan of the further Sum of 500*l.* and in consequence of such application the Defendants advanced and lent that Sum, upon *Lewis* giving a Promissory Note, dated the 9th of August 1823, and a Warrant of Attorney as a collateral security: That *Lewis* executed the Note and Warrant of Attorney with the privity and approbation, as the Defendants had been

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informed and believed, of *Bevan*, who previously knew that it was *Lewis*'s intention to execute the same, and that the 500*l.* was to be applied for the Partnership purposes, and for the joint use and benefit of *Bevan* and *Lewis*: That the 500*l.* was, by *Bevan*'s directions, paid to the Bankers of the Partnership, to the joint credit of the Partners, and was afterwards applied by them in paying the debts of the Partnership: That the Defendants had been informed and believed that, at the date of the Commission, and during the Partnership, *Bevan* had no Property therein: That the property had been seized under the executions before any act of Bankruptcy had been committed by *Bevan* and *Lewis*, or either of them: That, as the Defendants believed, the Partnership was considerably indebted to *Lewis*, and not *Lewis* to the Partnership: That the Defendants were unable to set forth whether the Partnership Effects were insufficient to pay the debts; and that they did not admit the validity of the Commission, or any of the requisites to sustain the same.

The answers were replied to, but no evidence was gone into on either side; and the Cause now came on to be heard.

After the Pleadings had been opened, Mr. *Heald*, with whom was Mr. *Rose*, for the Defendants *Siely* and *Cubbitt*, objected that the Supplemental Bill had been filed by the Assignees without the consent of the Creditors, and referred to *Ocklestone v. Benson* (a). But the Vice-Chancellor said that as the objection was not raised by the Answer, he could not regard it.

(a) 2 Sim. & Stu. 265.

Mr. *Horne*, and Mr. *Theobald*, for the Plaintiffs :—

The question is, whether the property, which has been taken under the executions, belongs to the parties who issued the writs, or to the Assignees. It is clear that the property that was seized belonged to the Partnership and that the debts for which it was seized were the separate debts of one of the Partners. The securities were executed, the judgments entered up, and the executions issued against *Lewis* only. If the Defendants have no Lien on this property, it is their own fault, as they might have had the Warrants of Attorney executed by both Partners which they omitted to have done. The utmost that the Defendants can be entitled to, is *Lewis*'s share of the surplus, if there shall be any, after all the demands on the Partnership are satisfied (b).

Mr. *Heald*, and Mr. *Rose*, for the Defendants *Siely* and *Cubitt* :—

If the debts for which the securities were given had been the separate debts of *Lewis*, no answer could be given to the arguments for the Plaintiffs. But they were the joint Debts of both Partners, notwithstanding the securities were executed by *Lewis* alone; for both the sums were used for Partnership purposes with *Bevan*'s privity and consent, and one of them was even borrowed, with his knowledge, for those purposes. These sums, therefore, by the use that was made of them, became joint Debts.

Mr. *Phillimore*, for the Defendants, *Laurie* and *Whittaker*, the Sheriff of Middlesex.

(b) See *Taylor v. Fields*, 4 Ves. 396, and *Campbell v. Mullett*, 2 Swanst. 551, and the Cases mentioned in the Notes on that Case.

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The VICE-CHANCELLOR:—

The judgments that have been entered up upon the securities for the sums in question, must take their character from the securities on which they have been so entered up; and, as those securities were executed by one only of the Partners, they constitute the creditors joint proprietors only with the other Partners. The accounts of the Partnership Estate and Debts must therefore be taken in the manner prayed by the Bill; and the Defendants will be entitled to be paid their debts out of *Lewis*'s share of any surplus that remains after all the demands on the Partnership are satisfied.

In the course of the argument in this Case, Mr. *Rose*, to whom the proceedings under the Commission of Bankrupt had been handed by the Solicitor to the Plaintiffs, the Assignees, was proceeding to contend that the Act of Bankruptcy on which the Commission had been issued, appeared, on the face of the proceedings, not to be a sufficient one; and that therefore the Commission was invalid; and he said that by the 92d sec. of the New Bankrupt Act (c), the depositions taken before the

(c) 6 Geo. 4, c. 16. The sections here referred to are as follows: sect. 90. And be it Enacted, that in any Action by or against any Assignee, or in any Action against any Commissioner or Person acting under the Warrant of the Commissioners, for any thing done as such Commissioner, or under such warrant, no proof shall be required, at the trial, of the Petitioning Creditor's debt or debts, or of the trading, or Act or Acts of Bankruptcy respectively, unless the other party in such Action shall, if Defendant, at or before pleading, and, if Plaintiff, before issue joined, give notice in writing to such Assignee, Commissioner, or other Person, that he intends to dispute some, and which of such matters; and, in case such notice shall have been given,

Commissioner were not conclusive, but only were evidence of the matters therein contained ; and that therefore, where the objection to the validity of the Commis-

if such Assignee, Commissioner, or other Person, shall prove the matters so disputed, or the other party admit the same, the judge before whom the cause shall be tried, may (if he thinks fit,) grant a Certificate of such proof or admission ; and such Assignee, Commissioner, or other Person, shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice, and such costs shall, if such Assignee, Commissioner, or other Person shall obtain a verdict, be added to the costs ; and if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such Assignee, Commissioner, or other Person.

Sect. 91. And be it Enacted that, in all suits in Equity by or against the Assignees, no proof shall be required, at the hearing, of the petitioning Creditor's debt or debts, or of the trading, or Act or Acts of Bankruptcy respectively, as against any of the parties in such suit, except such parties as shall, within ten days after rejoinder, give notice in writing to the Assignees, of his or their intention to dispute some and which of such matters ; and where such notice shall have been given, if the Assignees shall prove the matter so disputed, the costs occasioned by such notice, to be taxed by the proper officer, shall, if the Court see fit, be paid by the party or parties so giving such notice as aforesaid, and the service of such notice may be proved by affidavit upon hearing of the cause.

Sect. 92. And be it Enacted that, if the Bankrupt shall not, (if he was within the United Kingdom at the issuing of the commission) within two calendar months after the adjudication, or (if he was out of the United Kingdom) within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the Commissioners at the time of, or previous to, the adjudication of the petitioning Creditors debt or debts, and of the trading and act or acts of Bankruptcy, shall be conclusive evidence of the matters therein

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sion appeared on the proceedings, as it did not require evidence to support it, the notice of a party's intention to dispute the validity of the Commission which was

respectively contained, in all Actions at Law or Suits in Equity brought by the Assignees for any debt or demand for which the Bankrupt might have sustained any action or suit.

The Sections of the 49th Geo. 3, c. 121, which relate to the same subject, are as follows:— Sec. 10. And be it Enacted, by the authority aforesaid, that, from and after the passing of this Act, in any action now brought or hereafter to be brought by or against any Assignee of any Bankrupt, the Commission of Bankrupt, and the proceedings of the Commissioners under the same, shall be evidence to be received of the petitioning Creditor's debt, and of the trading and Bankruptcy of such Bankrupt, unless the other party in such action shall, if Defendant, at or before the time of his pleading to such action, and, if Plaintiff, before issue joined in such action, give notice in writing to such Assignee that he intends to dispute such matters or any of them; and where such notice shall have been given, if such Assignee shall at the trial prove the matter so disputed, or the other party shall at the trial admit the same, the judge before whom the cause shall be tried shall, if he shall see fit, grant a certificate that such proof or admission was made upon such trial; and such Assignee shall be entitled to the costs, to be taxed by the proper officer, occasioned by such notice; and such costs shall, in case the Assignee shall obtain a verdict, be added to his costs; and if the other party shall obtain a verdict, shall be set off or deducted from the costs which such other party would otherwise be entitled to receive from such Assignee.

Sec. 11. And be it further Enacted by the authority aforesaid, that, from and after the passing of this Act, in all suits in Equity now instituted or hereafter to be instituted by or against any Assignee of any Bankrupt, the Commission of Bankrupt, and the proceedings of the Commissioners under the same, shall be evidence to be received of the petitioning Creditor's debt, and of the trading and Bankruptcy of such Bankrupt, as against all the other parties in such suit, unless such parties, some or one of them, shall, within ten days after rejoinder in the cause

required by the two preceding sections, need not be given.

But the *Vice-Chancellor* ruled that the validity of a Commission could, in no case, be disputed where the notice required by the Act had not been given. *q*

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WALBANKE v. SPARKS.

21st May.

Practice.
Interpleader.
Affidavit.

THE Bill in this Case was a Bill of Interpleader; and, upon a motion made by Mr. Parker and opposed by Mr. Knight,

The *Vice-Chancellor* ruled that the Plaintiff in an Interpleading Suit might move for liberty to pay the money, the subject of dispute between the Defendants, into Court, and for an Injunction to restrain the Defendants from suing him at Law respecting it, without supporting his motion by an affidavit of facts.

No affidavit is necessary to support a Motion by a Plaintiff in an interpleading Suit for liberty to pay the Money into Court, and for an Injunction.

give notice in writing to the Assignee that they or he intend to dispute the said trading, petitioning Creditor's Debt, or Act of Bankruptcy, or some or one of such matters; and, where such notice shall have been given, if the Assignee shall prove the matter so disputed to the satisfaction of the court, the costs occasioned by such notice, to be taxed by the proper officer, shall, if the court see fit, be paid by the party or parties giving such notice, to the Assignee, and the service of such notice may be proved by affidavit upon the hearing of the cause. See *Ellis v. Shirley* 3 Camp. 424; *Jones v. Llewellyn*, 1 Mer. 6, note (a); and *Mills v. Bennett* 2 M. & S. 556. But see *Humphries v. Coggan*, 1 Rose, 226.

1827.
25th May,
and
1st June.

GAYLER v. FITZ-JOHN.

Practice.
Attachment.

An Order for time to answer, unless drawn up and served, will not stop an Attachment.

ON the 4th of May the Defendants obtained an Order for six Weeks time to answer the Bill, and bespoke the Order on the 5th. On the 8th, the Order was drawn up and served on the Plaintiff's Clerk in Court. On the 5th, the Plaintiff sealed an Attachment against the Defendants for want of an Answer.

Mr. *Knight*, for the Defendants, now moved to set aside the Attachment for irregularity, on the ground that the Order for time to Answer had been obtained before the Attachment was sealed, and that it took effect from the time it was pronounced.

Mr. *Heald*, contra, said that the Order for time had no operation until it was served, and that, therefore, the Attachment had been issued regularly; and he cited *Wallis v. Glynn* (a).

The Vice-Chancellor said that he considered the Case of *Wallis v. Glynn* as precisely in point; for that if an Order for time would not prevent the issuing of an Attachment, unless the original was shown to the Plaintiff at the time when he was served with the copy, *a fortiori*, an Order not drawn up could not stop an Attachment.

(a) *Coop.* 282. *S. C.* 19 *Ves.* 380.

JONES v. POWELL.

1827.
13th June,Practice.
Master's Cer-
tificate.The Master's
Certificate, as to
production of
Books, &c. by a
Party, can not
be excepted to ;
a Motion must
be made to
quash it.

61, Ser. 340-350

THE question in this Case was, whether a *Master's Certificate*, as to the production, by a Defendant, of Books, Papers and Writings, in his custody or power, relating to matters in question in the cause, could be excepted to.

Mr. Horne, and Mr. Koe, for the Defendant, who had taken the exceptions, contended that there was no other mode of appealing from the *Master's* judgment, and referred to a decision to that effect by Sir J. Leach, V. C. in the Cause of *Harris v. De Tastet*, on 9th April 1823.

Mr. Heald, and Mr. Tinney, appeared for the Plaintiff.

The *Vice-Chancellor* said that the difference between a Report and a Certificate was that, with respect to the former, the Court had laid it down, as an inflexible rule, that, before Exceptions could be taken to it, Objections must be carried in before the *Master*; but that there was no such rule with respect to the latter; That, if a Certificate like the one in question could be excepted to, he did not see why exceptions might not be taken also to a Certificate, given by the Accountant General, as to stock standing in his name: That the proper course was to move, on Affidavit, that the Certificate might be quashed.

Exceptions over-ruled.

1827.
15th June,
and
17th July.

*Construction of
Order.*

*Production of
Books, &c.*

A Party ordered to produce Books, &c. before the Master, is bound to leave them, if the Master thinks fit so to direct.

SIDDEN v. LIDDIARD.

ON a Motion made by Mr. Agar in this Cause, the Question was whether, under the Order, usually inserted in Decrees, that the Parties shall *produce* before the *Master* all Books, &c. as the *Master* shall direct; the *Master* was authorized to order the Parties to *leave* such Books, &c. in his Office; or whether a new Order must not be obtained for that purpose?

The *Vice-Chancellor* ordered the Motion to stand over, in order that he might consult the other Judges of the Court upon the subject; and on the 17th of July said, that he had conferred with the *Lord Chancellor* and the *Master of the Rolls* upon the subject, and that they concurred with him in opinion that, under the usual Order for production of the Books, &c. the *Master* was at liberty, without any further Order being obtained, to direct the Party to leave the Books, &c. in his Office, so long as he thought any useful purpose might be answered by their remaining there, and then to allow the Party to take them back (a).

(a) By the 60th of the Orders issued on the 3d April 1828, for the regulation of the Practice and Proceedings of the Court, it is ordered: "That where, by any Decree or Order of the Court, Books, Papers or Writings are directed to be produced before the *Master* for the purposes of such Decree or Order, it shall be in the discretion of the *Master* to determine what Books, Papers or Writings are to be produced, and when, and for how long they are to be left in his office; or, in case he shall not deem it necessary that such Books, Papers or Writings should be left or deposited in his office, then he may give directions for the Inspection thereof by the Parties requiring the same, at such time and in such manner as he shall deem expedient.

NEAME v. WAGSTAFF.

THE Defendant had been attached for want of an Answer, and the Sheriff had returned *cepi corpus*. A Messenger was then sent, but did not take the Defendant, as he was in custody, in the King's Bench Prison, upon mesne process.

Mr. O. Anderdon now moved for a *Habeas Corpus*, but said he doubted whether he ought not to have applied for a Sequestration, and referred to *Holme v. Cardwell* (a).

The Vice-Chancellor made an Order for a *Habeas Corpus*, with a view to the Defendant being turned over to the Fleet.

1827.
16th June.

Practice.
Process.

Where a Messenger has been sent upon a return of *Cepi Corpus*, and the Defendant is in K.B. prison upon mesne process, a *Habeas Corpus* must next be obtained.

NICHOL v. GWYN.

ON the 8th of March 1827 the Defendant was served, in *Paris*, with a Subpœna to appear and answer the Bill. The Plaintiff's Solicitor afterwards wrote to the Defendant's Solicitor, to inquire whether the latter meant to appear to the Bill. The Defendant's Solicitor, in reply, admitted that the Subpœna was in his possession: and said, That he had searched, but could not find that any Bill had been filed; but that, if the Defendant was regularly served, he should appear for her.

28th May, and
4th July.

Practice.
Attachment.

Attachment
granted for non-
appearance to a
Subpœna served
abroad.

2 Jany 544 Contia

(a) 3 Madd. 114.

1827.

NICHOL
v.
GWYN.

Mr. *Knight* for the Plaintiff now moved for an Attachment for want of Appearance: He said that the Correspondence between the Solicitors acknowledged the service of the Subpœna: and he cited *Scott v. Hough* (a); *Bourke v. Lord Macdonald* (b); and *Shaw v. Lindsay* (c).

Motion granted.
Reg. Lib. B. 1826. fol. 1303.

1st, & 15th June.

PEYTON v. BOND.

Practice.
Prochein Ami.

PEYTON v. ROBINSON.

The Court will remove a next Friend and appoint a new one, where the former is so connected with a Defendant, having an interest adverse to that of the Infants, as to make it probable that their Interest will not be properly protected by him.

Mr. *Heald*, and Mr. *Beames*, now moved, that *Isaac Peyton* might be removed from being the next Friend of the Infants; and that it might be referred to the Master to appoint a proper person to be their next

(a) 4 Bro. C. C. 213. (b) 2 Dick. 587.
(c) 18 Ves. 496.

Friend in his place. They said that it appeared, by the Affidavits, that the next Friend was a Person in low circumstances : That he was the Brother of the Infants Father : That he was a material Witness in the Cause for the Father, and had been a Witness for him in the Proceedings in the Ecclesiastical Courts : That the interests of the Father and of the Infants were directly adverse to each other : That the Solicitor for the Infants acted for the Father also : That he had been for ten years the Father's confidential Solicitor ; and that it was on his application that *J. Peyton* had consented to be the next Friend of the Infants ; and they contended that, under such circumstances, it was impossible that the interest of the Infants should be protected as it ought to be.

Mr. Horne, and *Mr. Knight*, for the next Friend, said that the question in the Suit was a mere Question of Law, which it was impossible for either the Solicitor or the next Friend to prevent being properly submitted to the Court, even if they were disposed to do so ; and that no case of misconduct had been brought forward against either of them.

Mr. Sugden appeared for the Trustees, and *Mr. Wakefield* for the Father.

The VICE-CHANCELLOR :—

The single question in this Case is, whether it is proper that this Solicitor should continue to act for the next Friend, and that the next Friend of the Infants should be suffered to remain, regard being had to the relation in which he stands to the Defendant, the Father of the infant Plaintiffs ?

1827.
PEYTON
v.
BOND.

1827.PEYTON
v.
BOND.

I am warranted by high authority in saying that, in Family Suits, it is proper that the same Solicitor should be employed for all Parties: but the Court will watch with great jealousy a Solicitor who takes upon himself a double responsibility; and, if it sees a chance of his miscarrying, will take care, where the Plaintiffs are Infants, that he shall not be permitted to stand in that relation to an adverse Defendant under circumstances of very adverse interest. This Gentleman, therefore, ought not to continue the Solicitor of the next Friend.

If it could be tendered to me, by Affidavit, that a man of substance, who is himself unconnected with the Parties, and who would employ a Solicitor similarly situated, was willing to undertake the office of next Friend, I should have no hesitation in making the Order immediately, and without making any reference to the *Master*.

Some Persons were afterwards proposed, on behalf of the Infants, as fit to be appointed the new next Friend; but the other Parties objected to them: whereupon the *Vice-Chancellor* made an Order in the terms of the Motion.

Reg. Lib. B. 1826. fol. 1323.

STERNDALE v. HANKINSON.

THE Bill was filed, on the 5th of May 1812, by *T. Sterndale* and *J. Robley*, Grocers and Co-partners, and *Edward Fogg*, *W. Birch*, and *John Hampson*, also Grocers and Co-partners, on behalf of themselves and all other the Creditors of *George Hankinson*, Grocer, deceased, who should come in, &c. against *William Hankinson*, *Margaret Hankinson*, Widow, *John Marsden*, and *John Walton*. The Facts stated in the Bill, and admitted by the Answers, were that *George Hankinson*, for many years before, and at the time of his decease, carried on the trade of a Grocer at *Pendleton* in *Lancashire*: That he was at his death a Trader within the meaning of the Bankrupt Laws; and was also seised of real Estates, and possessed of personal Estate: That he died on the 27th of June 1810, intestate, leaving the Defendant, *W. Hankinson*, his eldest Son and Heir at Law, and the Defendant, *Margaret Hankinson*, his Widow: that *Margaret Hankinson* was his Administratrix: That he was at his decease indebted to the Plaintiffs *Sterndale* and *Robley* in $72l. 15s. 4d.$, and to the Plaintiffs *Fogg*, *Birch*, and *Hampson*, in $35l. 4s. 2d.$ and to divers other persons: That after his death his Widow carried on the trade of a Grocer: That a Commission of Bankrupt had issued against her, under which she had been declared a Bankrupt; and that the Defendants *Marsden* and *Walton* were her Assignees. The Bill prayed for the usual Accounts of the Debts due to the Plaintiffs and the other Creditors who should come in, &c. and

but a Balance is ultimately due to *C*. Held that *B*'s Debt was discharged by *A*'s payments, and that the ultimate Balance cannot be proved as a Debt against *B*'s Estate.

E E 3

Berningren v. Darke. 2. Jones & C. 289.
Thomas v. Griffith 2 D. & V. S. 563.
Manby v. Manby 3 Ch. D. 103
in re Greaves 18 Ch. D. 507

1827.

STERNDALE

v.

HAWKINSON.

of the Intestate's Real and Personal Estates, and that those Estates might be applied in payment of the Debts of the Plaintiffs and the other Creditors of the Intestate who should come in, &c.

On the 14th of April 1818 the Decree, which is usual in Suits of the like nature, was made. The *Master* reported that several Persons had come in before him and claimed Debts to be due to them from the Intestate, none of which he had thought fit to allow, except one, which had been proved by the Plaintiffs *Birch* and *Hampson*, the surviving Partners of the late Plaintiff *Fogg*; and that his reason for disallowing the Debts claimed by the other Persons, was that the Testator died in 1810, and that the Decree was not made until eight years afterwards, and that no proceedings had been taken for the recovery of those Debts, whereby the claimants were, as he conceived, barred of any remedy. Three of the Persons whose claims had been disallowed excepted to this Report.

Mr. *Agar*, Mr. *Parker*, Mr. *Barber*, and Mr. *Bickersteth*, in support of the Exceptions.

It is the *Master*, and not the *Administratrix*, who insists that these debts are barred by the Statute of Limitations. It was decided in *Norton v. Frecker* (a), that an Executor is not bound to take advantage of that Statute. Besides, in this Case the Intestate was a Trader, and the 47th G. 3, sess. 2. c. 74, creates a Trust for the payment of the Trader's Debts: and his Real Estates are to be administered in this Court. Now the Statute of Limitations cannot bar a Trust.

(a) 1 Atk. 524. See also *Ex parte Dewdney*, 15 Ves. 479. 498.

If the Administratrix had meant to take advantage of the Statute, she ought to have taken in a counter-state of facts, which she did not. The Rule is that, if a Debt is to be contested upon what does not appear upon the Claimant's state of facts, a counter-state of facts must be carried in. *Prince v. Heylin* (b). [To this the Vice-Chancellor assented, and said that if a counter-state of facts had been carried in, the Creditor might have proved acknowledgments of his demand within the six years; and that the Decree directed the *Master* to inquire, not what debts were owing by the intestate at the date of the Report, but at the time of the Intestate's decease.] The Statute of Limitations has not of itself any force in Courts of Equity. Those Courts have merely adopted a Rule founded on the principle of that Statute, and by analogy to it. *Oliver v. Court* (c). Besides this Bill is in fact a Bill by every Creditor.

It has been laid down that the filing of a Bill will not prevent the operation of the Statute. But this position must be thus limited: Where the Suit is commenced before the Six years have run, and the Bill is dismissed afterwards, the pendency of that Suit shall not prevent the operation of the Statute. It is nowhere laid down that a Bill filed and followed up by a Decree, does not prevent the operation of the Statute. Here the Administratrix could not have pleaded the Statute, as the Six years had not expired when the Bill was filed. The *dictum* of Lord *Eldon*, C., in *ex parte Dewdney*, refers to a case where the Statute might have been pleaded when the Answer was put in (d). The pronouncing of the Decree must be taken to

(b) 1 Atk. 493.

(c) 8 Price, 127. 169.

(d) See 15 Ves. 497, 498.

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v.
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have relation to the time when the Bill was filed. Is every Creditor, immediately on the Debtor's decease, to sue the personal Representative, and so waste the Assets. It is not the fault of any party that the Decree was not obtained immediately upon the Answer being put in. It was the course of the business of the Court that prevented it.

Mr. *Heald*, Mr. *Shadwell*, Mr. *Duckworth*, and Mr. *Knight*, for the Report:—

No Legatee can obtain a Decree for payment of his Legacy, without the Decree being prefaced with a direction that an Account shall be taken of the Testator's Debts, and that those Debts shall be paid. If then these exceptions are to be allowed, the operation of the Statute of Limitations will be stopped in every case where a Bill is filed by a Legatee. There are only two modes by which the operation of the Statute can be prevented: first, where there has been an acknowledgement of the Debt by the party sought to be charged: secondly, where a Suit has been instituted which the Creditor can control. A Suit like the present one is in the sole power of the Plaintiff on the Record: he may dismiss it whenever he pleases. *Handford v. Storie* (e). [The *Vice-Chancellor*: Suppose the Court has appointed a Receiver to collect the Creditor's Estate, does the Rule apply to that Case?] Notwithstanding the Court may have appointed a Receiver, the Creditor who has filed the Bill may dismiss it. Before a Decree is made, whatever may be the laches of the Plaintiff, no other Creditor can apply to have the conduct of the Cause. The Answer to such an application would be: “Insti-

(e) 2 Sim. & Stu. 196.

tute a Suit of your own." The other Creditors' hands are not tied, in any sense, by the commencement of the Suit. The filing of a Bill by *A.* does not prevent the Statute from running against *B.* and *C.* [The *Vice-Chancellor*: This is not a Bill filed simply by *A.*, but by *A.* on behalf of himself and all other Creditors. It is in fact a Bill by all the Creditors.] No Creditor, except the Plaintiff, can prove his Debt in order to maintain the Suit. If the Bill is dismissed, the circumstance of its having existed is no Answer to a plea of the Statute; and there cannot be one rule where the Bill is dismissed, and another where a Decree is made. If the principle upon which the Exceptions are founded is to prevail, a Suit may be suffered to remain abated for twenty years, and yet a Debt, which was within a year of being barred when the Bill was filed, will be kept alive. It is the Decree only which stops the other Creditors; but before the Decree is pronounced the Statute will run. *Lake v. Hayes* (*f*), *Anon.* (*g*), *Ex parte Roffey* (*h*), *Ex parte Ross* (*i*). The 47 Geo. III. s. 2, c. 74, does not place Creditors in a better situation than they were in before that Statute, except that it subjects the real Estates of the Debtor to payment of his Simple-contract Debts.

The Vice-Chancellor:—

That the commencing proceedings in Equity will not prevent the operation of the Statute of Limitations, is indisputable. If a Creditor's Bill is dismissed, the pendency of the Suit will not prevent the Defendant from taking the benefit of the Statute.

1.4 x 6.11.205.

(*f*) 1 Atk. 281. (*g*) 2 Atk. 1. (*h*) 19 Ves. 468.
 (*i*) 2 Glynn & Jam. 46. Affirmed by the Lord Chancellor,
 13th August 1827.

1827.
 STERNDALE
 v.
 HANKINSON.

1827.

STEADDALE
v.
HANKEINSON.

This case has been reasoned on two fallacies, as applied to the jurisdiction of the Court. First, the Statute does not bar the Debt, but the remedy only; and Courts of Law have permitted the Statute to be evaded by recognitions of the demand, to such an extent as to amount, almost, to a repeal of the Statute. On this ground I think that the Debt exists.

*unb. for a ~
legal demand
2. Oct. 1827
1. Oct. 1829.*

The other fallacy is, that the Statute bars the Suit in Equity; which it does not. But, as Courts of Equity will not entertain stale demands, they have thought proper to adopt the limit of six years, in analogy to the Statute; and Pleas of the Statute are admitted in these Courts by analogy only. Where the circumstances of a Case are such as to make it against conscience to apply the rule founded upon this analogy, the Court will not enforce it. It has been said that, if a Creditor files a Bill on behalf of himself and others, and permits it to be dismissed before Decree, the Statute would apply. I dissent from this proposition; for I think that the Court would protect a Creditor against any accident of that kind. I have no doubt that, if a Creditor file a Bill and it appears that the rule adopted by analogy to the Statute would affect his demand, but that a Bill had been before filed by another Creditor, and that the Plaintiff in the second Suit had, in confidence that the former Suit would be prosecuted, abstained from filing his Bill, the Court would not apply its rule. Every Creditor has, to a certain extent, an inchoate interest in a Suit instituted by one on behalf of himself and the rest; and it would be attended with mischievous consequences to estates of deceased Debtors if the Court were to lay down a rule by which every Creditor would be bound either to file his Bill, or bring his Action.

Suits have been instituted in which Creditors, in consequence of the deaths of Parties and a variety of other circumstances, have been unable to procure a Decree for two or three years, although every reasonable diligence may have been used; and, if the schedules to most of the Reports made in Suits of this nature were looked through, it would be found, by comparison of dates, that two thirds of the Creditors might have been shut out by a strict application of the rule.

The principle of convenience does not apply; for the adoption of the rule, in all cases where the six years had run before the Decree, would not, for the reasons I have before stated, be a protection to the Estates of Debtors, in the aggregate.

It has been said that every Creditor who files a Bill on behalf of himself and the other Creditors may dismiss his Bill if he pleases. But this proposition is not true to the extent to which it has been stated. I apprehend that it is not the rule of the Court that a Creditor may, under all circumstances, dismiss his Bill. I recollect instances in which a Creditor who has filed a Bill on behalf of himself and the other Creditors, has worked a benefit to himself by the Orders of the Court, and has attempted to dismiss his Bill; but I have a strong impression that Lord *Eldon* said that, having given the Court possession of the Suit by a Decretal Order, it was not competent to him to defeat any other Creditor by dismissing his Bill.

I entertain no doubt that every Creditor has, after the filing of the Bill, an inchoate interest in the Suit to

1827.
STEYNDALE
v.
HARRISON.

1827.
—
STERNDALE
v.
HANKINSON.

the extent of its being considered as a demand, and to prevent his being shut out because the Plaintiff has not obtained a Decree within the six years; and, therefore, I am clearly of opinion that this Exception must be allowed.

Another Exception was taken to the Report, by the Plaintiff *Robley*, who had claimed a debt of $82l. 15s. 4d.$ in which the Intestate, at the time of his death, was indebted to him, on balance of account, for Goods sold and delivered by him and *Thomas Sterndale*, his late Co-partner, to the Intestate.

It appeared, by the Ledger of *T. Sterndale* and *Robley*, that the Intestate, on the 9th of April 1809, owed them a balance of $192l. 3s. 7d.$ From that time to the day of the Intestate's death they sold him Goods to the amount of $106l. 15s. 3d.$, making together $298l. 18s. 10d.$; and they received, in Cash and Goods, during the same period, $142l. 11s.$, leaving a balance of $156l. 7s. 10d.$ due from the Intestate at his death. This Balance was struck at the foot of the left-hand page, and was carried over to the following Account:

CASES IN CHANCERY.

Dr. Mart Hankinson, Pendleton. Cr.

	£.	s.	d.	£.	s.	d.
1810:				1810:		
To Balance bro't up, G. H.	156	7	10	July 23	-	-
To Goods	21	6	10	Aug. 1	-	-
To D°	471	-	-	By Cash	-	-
To D°	487	7	19	By Cash	-	-
To D°	545	21	12	By Cash	-	-
To D°	-	-	6	By D°	-	-
To D°	1	34	16	By Cash	-	-
To D°	47	9	18	By Cash (p' son Rich ^d)	-	-
To D°	142	9	6	Oct. 16	By D° and Cop ^r 10 <i>l.</i>	-
To Copper not rec'd Dec. 24	10	-	-	Nov. 10	By D°	-
				- 12	By D°	-
				- 26	By D° and Cop ^r 11 <i>l.</i>	-
				Dec. 11	By D° and d° 10 <i>l.</i>	-
				- 24	By D° and d° 10 <i>l.</i>	-
					Balance carried down	-
						60 13 7
	£.	271	6	£.	271	6 7
1811:				1811:		
To Balance	-	-	-	Jan. 9	-	-
To Soap, 20/-	-	-	-	- 21	-	-
To Goods	-	173	-	By Cash, Jn ^r Sevill, for Coals	1	1 4
To Copper not rec'd Dec. 10	10	-	-	By Cash	10	-
				Balance carried down	70	11 -
	£.	81	12	£.	81	12 4
To Balance	-	-	-	Feb. 4	-	-
To Copper not rec'd Dec. 11	70	11	-	By Cash	-	-
To Goods	10	-	-	By Cash	-	-
To D°	207	17	4	By Cash	-	-
		1	14	Balance carried down	231	- 19 -
	£.	99	7		82	15 4
To Balance	-	-	-		£.	99 7 4
	£.	82	15	June 11	-	By Copper (not come) £.
		4				10 - -

1827.

STERNDALE
v.
HANKINSON.

Mr. *Ager* and Mr. *Barber*, in support of the Exception:—

It will be contended that, from the manner in which the Balance of $156l. 7s. 10d.$ was brought forward in the Ledger, *Robley* adopted Mrs. *Hankinson* as his Debtor, and that therefore he had waved his claim as against the Intestate's Estate; and *Clayton's Case*, in the report of *Devaynes v. Noble* (k), will be relied upon. But this is not like the case of a Partner who continues the Business and adopts the Debt of his deceased Co-partner. Here there is no Contract on the part of the Administratrix to take on herself the Debts of the Intestate. The keeping of these Accounts was the act of the Creditor, and was not adopted by the Administratrix. There always must be two parties to a Contract; but there is no evidence that the Administratrix was a party to these transactions. Besides, the insertion of the Initials of the Intestate's Name in the Account, shows that the Plaintiff did not mean to charge the Administratrix with that Debt, and to release the Intestate's Estate.

Mr. *Heald* and Mr. *Knight*, for the Report:—

The Plaintiff *Robley* clearly adopted the Administratrix as his Debtor, by making her Debtor to the amount of the Balance due at the Intestate's decease; *Clayton's Case* (l). It appears, by the Ledger, that the Balance was once reduced so low as to $60l. 13s. 7d.$ How then could it ever afterwards amount to $82l. 15s. 4d.$ as against the Intestate? It is impossible that this Balance can be due from the Intestate's

(k) 1 Mer. 572.

(l) *Ub. sup.*

Estate. Indeed it is not pretended that the Goods, with which the Widow was supplied, were furnished to her as Administratrix of her late Husband. If all the Payments made by her are to be taken in discharge of the $156l. 7s. 10d.$, the whole would be discharged; therefore, *quacunque viâ*, there is nothing due from the Intestate's Estate.

The VICE-CHANCELLOR:—

I have no doubt that the *Master's* Report is right.

It is admitted that a Balance of $156l. 7s. 10d.$ was due at the Intestate's death. The Widow, having possessed Assets, permits Accounts to be rendered to her in which she is made Debtor to that amount. Between the rendering of the Account and the 24th of December in the same year, she paid, to the Party rendering the Accounts, Sums to a greater amount than the Balance with which she was charged; and the question is, whether she did not intend to pay the Debt of her Husband. Suppose that, in December 1810, a Bill had been filed, by this Creditor, against the Administratrix, to make her account for her receipts on account of the Intestate's Estate, and that an application had been made in the Suit for her to pay the amount of Assets received by her into Court; if it appeared that she had made payments in discharge of the Balance due from her Husband, the Court certainly would not order her to pay in the whole amount of her receipts, but would, undoubtedly, allow her to retain the amount of payments so made by her.

Exception over-ruled.

1827.

STERNDALE
v.
HANKINSON.

1827.
18th & 19th
June, and
29th October.

Pleading.
Defendant.
Broker.

454 A.D. 226
246 A Broker in the
City of London
must answer a
Bill of Discovery
in aid of an
Action brought
against him by
his Employer for
misconduct, al-
though the dis-
covery will sub-
ject him to the
Penalty of a
Bond given by
him to the Cor-
poration, on his
admission.

2. 6 in 240.
5 in 446. Practice.
Exception.
amendement.

If a general Exception is taken to a Master's Report, and the Court is of opinion that the Master is right in any one Particular, the Exception must be overruled. ⁴³⁸

1. Mark 315
13 & C. 114

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THE Bill stated that the Defendants had for several years carried on the business of Wool-brokers, in Partnership together, under the firm of *James Weaver & Co.*, and that the Plaintiff had for several years carried on, in *Coleman Street*, the business of a Blackwell Hall Factor: That the Plaintiff, in the way of his business as a Blackwell Hall Factor, had had considerable dealings with the Firm of *James Weaver & Co.*, in the way of their business as Wool-brokers; and that the Plaintiff, as a Blackwell Hall Factor, had been accustomed to deal extensively in buying and selling Wool: That, on the 23d of December 1820, the Plaintiff, for the first time, employed *James Weaver & Co.*, as Wool-brokers, to purchase for him Thirteen Bags of Spanish Wool; and it was agreed between him and *James Weaver & Co.*, that the amount thereof should be paid for in One Month, in Cash, with a discount thereon, in favour of the Plaintiff, of five per cent on the amount thereof; and *Weaver & Co.* soon afterwards made out and delivered to the Plaintiff a Bill on Account of such Purchase in the following words and figures:—"London, 23d of December 1820. Bought, for account of Mr. *Thomas Green*, the following Goods; viz.: Thirteen Bags of Spanish Wool, to be weighed in one month, and the amount paid in Cash, with five per cent Discount, Brokerage half per cent. *James Weaver & Co.*" And *Weaver & Co.*, at the same time, made out and delivered to the Plaintiff, a Bill of Parcels or Account of the Thirteen Bags of Spanish Wool, to the following effect: "London, 23d of December 1820. Mr. *Thomas*

Williams v. Tye 180 *Beav.* 368. *Robinson v. Kitchen*
21 *id.* 370. *Nash v. Bryant* 25 *Beav.* 536.
Aston's Case 4 *De G.* & *Jones* 322.
Robinson v. Kitchen 8 *D. & G.* 90.

Green, Bought of James Weaver & Co., for their Principal, Thirteen Bags of Spanish Wool, payable in Cash in one month, 524 l. 14 s. 4 d., Discount five per cent, 26 l. 4 s. 8 d.—498 l. 9 s. 8 d." That the Plaintiff, on the Bills or Accounts being so made and delivered to him, objected to the words or expressions therein, " for their Principal," it being expressly understood between the Plaintiff and Messrs. *Weaver & Co.* that the Plaintiff would not accept any Contract for Wool made out by them as for their Principal, and without a name; but that he should always have the name of such Principal, in order that he might know with whom he was dealing; and it was also understood between them that Messrs. *Weaver & Co.* should only purchase for, or sell to the Plaintiff, Wools at first hand, or from the real Importer of such Wools: That it is very disadvantageous, to a Dealer in Wool, to purchase Wool at second hand, or from any other Person than the Importer; and that buyers of Wool for sale will give a higher price for Wool, if it be supposed to come immediately from the Merchant or Importer, than from any other Dealer in the same article; and that great frauds or impositions have been and are practised upon Buyers, by Brokers concealing the name of the real Owner of Wools, or giving in false or fictitious names as the Owners, thereby making sales for their own advantage, which would not otherwise be made, and obtaining higher prices than they could otherwise obtain if the name of the real Owner or Seller was fairly disclosed, as it is the duty of Brokers in all cases to do: That the Plaintiff objecting as aforesaid, the Defendant *Stanley* informed him that the Thirteen Bags of Spanish Wool belonged to a Mr. *Laidlow*, but that Mr. *Laidlow* did not like his name to be known in the Market; and

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the Plaintiff thereupon took the Thirteen Bags of *Spanish Wool*, supposing Mr. *Laidlow* to be the Merchant or Importer of such Wool; but it afterwards appeared, and the fact was, that Mr. *Laidlow* had been a Clerk in some Mercantile House, and was not the real Owner or Importer of the Thirteen Bags of Wool; and that the name of Mr. *Laidlow* was only used to mislead the Plaintiff, instead of giving the name of the real Importer or Owner; and Messrs. *Weaver & Co.*, in fact, participated in the profit on the sale to the Plaintiff of the Thirteen Bags of *Spanish Wool*, in the name of Commission or otherwise, to a considerable amount, instead of selling the same to the Plaintiff at the fair Market Price, with an allowance only of their Brokerage, of half per cent on the amount thereof, as they ought to have done; and they well knew that the Plaintiff would not have purchased the Wool of Mr. *Laidlow* if he had known who Mr. *Laidlow* was, or to whom the Wool in fact belonged; and Messrs. *Weaver & Co.* sold the Thirteen Bags of Wool to the Plaintiff at, and received from him, a much higher price than the real Importer thereof would have done; and they therefore became, and were accountable to the Plaintiff for the amount of the profit derived from such sale, and ought to render an account thereof to the Plaintiff, and pay to him the amount thereof; and that they ought to be charged with, and allow to the Plaintiff, the difference between the price at which they sold the Thirteen Bags of Wool to the Plaintiff, and the price at which the same would have been sold to him by the real Importer thereof: That the Sum of 498*l.* 9*s.* 8*d.*, the amount of the Purchase-money for the Thirteen Bags of *Spanish Wool*, after deducting the Discount thereon, was duly paid by the Plaintiff, at the stipulated time,

to Messrs. *Weaver & Co.*: That, on the 26th of September 1821, the Plaintiff employed *James Weaver & Co.*, as Woolbrokers, to purchase for him Three Bags of *German Wool*; and it was agreed between the Plaintiff and *James Weaver & Co.* that the amount thereof should be paid for by the Plaintiff, by his acceptance of a Bill of Exchange, to be drawn upon the Plaintiff, and made payable four months after date, with a Discount thereon, in favour of the Plaintiff, of two and a half per cent on the amount thereof; and Messrs. *Weaver & Co.* soon afterwards made out and delivered to the Plaintiff a Bill or Account of such last-mentioned Purchase, in the following words and figures:—" *London, September 26th, 1821. Bought, for account of Mr. Thomas Green, of Mr. Henry Kirkpatrick, the following goods; viz. Three Bags of German Wool, to be weighed in one month, and the amount paid by your Acceptance at four months date, with two and a half per cent Discount; Brokerage, half per cent. James Weaver.*" And Messrs. *Weaver & Co.*, at the same time, made out and delivered to the Plaintiff a Bill of Parcels or account of the three last-mentioned Bags of *German Wool*, to the following effect:—" *London, 26th September 1821. Mr. Thomas Green, Bought of Henry Kirkpatrick Three Bags of German Wool, payable by an Acceptance at four months date, from 26th October 1821. 229 l. 8 s. 6 d. Discount, two and a half per cent. 5 l. 14 s. 9 d. 223 l. 13 s. 9 d.*" That, in pursuance of the last-mentioned Contract, the Plaintiff accepted and delivered to Messrs. *Weaver & Co.* a Bill of Exchange, drawn by or in the name of *Henry Kirkpatrick*, dated the 28th October 1821, for 223 l. 13 s. 9 d. and thereby made payable four Months after date, to the order of *Henry Kirkpatrick*: That

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this Bill was duly taken up and paid by the Plaintiff when it became due and payable. The Bill then stated three similar transactions to have taken place between the Plaintiff and Messrs. *Weaver & Co.* on the 30th October and 22d November 1821, and 30th October 1822; and then proceeded thus: That, on the occasion of making the last-mentioned contracts of the 26th September 1821, the 30th October 1821, the 22d November 1821, and 30th October 1822, Messrs. *Weaver & Co.* represented to the Plaintiff that *Henry Kirkpatrick* was a Merchant residing in *Cheapside* in the City of *London*, and was the Person by whom the several quantities of Wool mentioned in such Contracts had been imported, and that such Wool could not be got from any person other than Messrs. *Weaver & Co.*; and that no other Broker than themselves had any sample of such Wool: That Messrs. *Weaver & Co.*, prior to the Plaintiff making the last-mentioned Contracts, offered to sell to him the several last-mentioned quantities of Wool, as being in the hands of the Importer thereof, namely, *Henry Kirkpatrick*; but the Plaintiff afterwards discovered that the said several quantities of *German Wool* were not, nor was any part thereof, in fact, imported by *Henry Kirkpatrick*, and that there was not any Person resident in the City of *London*, of the name of *Henry Kirkpatrick*, who is an Importer of Wool, but that the Wool was imported by one Mr. *Fuchs*, a *German Merchant* in *London*: That these Wools were not the property of *Henry Kirkpatrick*, but of *William M. Everett*, who was a *Blackwell Hall Factor* in *London*, and a dealer in Wool, and had been purchased by him through Messrs. *Weaver & Co.* and that the name of *Henry Kirkpatrick* was made use of by Messrs. *Weaver & Co.* with the knowledge that the said Wools were the property of *Everett*,

and not of *Kirkpatrick*; and that they were employed by, and received their directions solely from *Everett* in the sale thereof, and accounted with him for the proceeds thereof; and that the name of *Kirkpatrick* was only made use of in order to deceive the Plaintiff, Messrs. *Weaver & Co.* well knowing that they were acting contrary to their duty as Brokers, and the understanding between them and the Plaintiff, upon the faith of which they were employed by him, and knowing also that the Plaintiff would not have bought the Wools at all, or would not have given the same price for them, if he had been aware that they were the Property of *Everett*, and not of the Importer: That Messrs. *Weaver & Co.* were employed, as the Brokers of the Importer, in the Sale to, and Purchase of these Wools by *Everett*, and that, previous to the Purchase thereof by *Everett*, samples had been shown by Messrs. *Weaver & Co.* to the Plaintiff, for the Importer or Importers thereof; and that the same had been offered to, and agreed for by the Plaintiff, or that the Plaintiff had made them a bidding for the same before the same were sold to and purchased by *Everett*; and that the Sales were so conducted by Messrs. *Weaver & Co.* as to secure a certain Profit to *Everett*, or other intermediate Purchaser, to the prejudice both of the Importer and of the Plaintiff, and to obtain an extra profit or advantage to themselves in the name of Commission, or otherwise, instead of selling the Wools, directly from the Importer thereof, to the Plaintiff, as they ought to have done: That Messrs. *Weaver & Co.* well knew that Mr. *Fuchs* was desirous of selling Wools directly to the Plaintiff, and had solicited the Plaintiff to purchase his Wools; but that, in order to dissuade the Plaintiff from dealing directly with Mr. *Fuchs*, Messrs. *Weaver & Co.* repre-

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sented the character of Mr. *Fuchs* to the Plaintiff in a very unfavourable light; and Messrs. *Weaver & Co.* being employed by the Importers of such Wools as aforesaid, they were thereby enabled to make a double sale thereof for their own advantage, at the same time, at two different prices, instead of an immediate sale to the Plaintiff; That, in order to deceive the Plaintiff in such Purchase and Sale to him, the marks of such Wools were altered, and the letter K. introduced therein, as the initial of *Kirkpatrick*'s name, to denote that he was the Importer or Consignee of such Wools: And that Messrs. *Weaver & Co.* derived an extra Profit, to a considerable amount, on the Sales to the Plaintiff of the last-mentioned quantities of Wool, or participated in the Profit on such Sales to the Plaintiff, to a considerable amount, instead of selling the same to the Plaintiff at the fair Market Price, with an allowance only of their Brokerage of half per cent. on the amount thereof, as they ought to have done: And Messrs. *Weaver & Co.* sold the last-mentioned quantities of Wool to the Plaintiff at, and received from him, a much higher Price than the real Importer would have done; and Messrs. *Weaver & Co.*, therefore became and were accountable to the Plaintiff for the amount of the Profit derived from the last-mentioned Sales, and ought to render an account thereof to the Plaintiff, and pay to him the amount thereof; and that they ought to be charged with and allow to the Plaintiff the difference between the Price at which they sold the last-mentioned quantities of Wool to the Plaintiff, and the Price at which the same would have been sold to him by the real Importer. The Bill then charged that the Defendants had in their custody divers Books of Account, &c. relating to the matters aforesaid, and that

the Plaintiff had commenced an Action at Law against them, to recover damages from them, in respect of their fraudulent conduct as his Brokers, in the several transactions before mentioned; but that the Plaintiff was not able to prove the facts and circumstances before stated without a Discovery from the Defendants touching such facts and circumstances. And the Bill prayed for a Discovery accordingly.

The Defendant, *James Weaver*, by his Answer, said that he believed that the Complainant did carry on, and for several Years had carried on, in *Coleman-street*, in the City of *London*, the business of a Blackwell-Hall Factor, and that the Complainant, as a Blackwell-Hall Factor, had been accustomed to deal extensively in buying and selling Wool: And that, by an Act of Parliament, made and passed in the Sixth Year of the Reign of Queen *Anne*, intituled: "An Act for repealing the Act of the 1st Year of King *James* First, intituled: An Act for the well garbling Spices, and for granting an equivalent to the City of *London*, by admitting Brokers," it was enacted that, from and after the determination of the then Sessions of Parliament, all Persons that should act as Brokers, within the City of *London* and the Liberties thereof, should, from time to time, be admitted so to do by the Court of Mayor and Aldermen of the said City, for the time being, under such Restrictions and Limitations for their honest and good behaviour as the Court should think fit and reasonable (a). And the Defendant further said that, subsequently to, and in pursuance of the powers given to them by the said Act, the Court of Mayor and Aldermen made certain Rules and Regulations touching the

(a) Sec. 4.

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admission of Brokers, and such Rules and Regulations had ever since been and still were in force, and, by virtue thereof, every Person who applied to be admitted a Broker within the City and Liberties thereof, was required, previously to his Admission, to execute a Bond to the Mayor, Commonalty and Citizens of *London*, in such penalty and with such condition as are contained in the Bond mentioned to have been executed by the Defendant, and was also required to take an Oath to the effect of the Oath mentioned to have been taken by the Defendant. And the Defendant further said that he was admitted to act as a Broker, within the City of *London* and the Liberties thereof, by the Court of Mayor and Aldermen, in the Year 1814; and that, previous to such Admission, the Defendant, in compliance with the aforesaid Rules and Regulations, executed a Bond, whereby he bound himself, his Heirs, Executors and Administrators, unto the Mayor and Commonalty and Citizens of the City of *London*, in 500*l.*, to be paid to the Mayor and Commonalty and Citizens, with a condition written under the same Bond in the following words :

“ Whereas the above-bounden *James Weaver* is, by the Court of Lord Mayor and Aldermen of the City of *London*, allowed to be admitted and sworn a Broker within the same City and Liberties thereof, to have, use and exercise the said office and employment during the pleasure of the said Court, and no longer: Now the condition of this obligation is such, that if *James Weaver*, for and during such time he shall and doth continue in the said office and employment, shall and do well and faithfully execute and perform the same, without fraud, covin or deceit, and shall, upon every

Contract, Bargain or Agreement by him made, declare and make known, to such Person or Persons with whom such Agreement is made, the Name or Names of his Principal or Principals, either Buyer or Seller, if thereto required, and shall keep a Book or Register, and therein truly and fairly enter all such Contracts, Bargains and Agreements, within three days after making thereof, together with the Names of the respective Principals for whom he buys or sells, and shall, upon demand made by any of the Parties, Buyer or Seller, concerned therein, produce and show such Entry to them or either of them, to manifest and prove the truth and certainty of such Contracts and Agreements, and, for satisfaction of all such Persons as shall doubt whether he is a lawful and sworn Broker or not, shall, upon request, produce a Medal of Silver, with his Majesty's Arms engraved or stamped on the one side, and the Arms of the City, with his Name, on the other, and shall not, directly or indirectly, by himself or any other, deal, for himself or any other Broker, in the Exchange or Remittance of Money, or in buying any Tally or Tallies, Order or Orders, Bill or Bills, Share or Shares, or Interest in any joint Stock to be transferred or assigned to himself or any Broker, or to any other in trust for him or them, or in buying any Goods, Wares, or Merchandises to barter or sell again, upon his own account, or for his own or any other Broker's benefit or advantage, or make any gains or profit in buying or selling any Goods over and above the usual Brokerage, and shall and do discover and make known, to the Court of Lord Mayor and Aldermen, in writing, the Names and Places of abode of all and every Person and Persons as he shall know to use and exercise the said office or employment, not being thereunto

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duly authorized and empowered as aforesaid, within thirty days after his knowledge thereof, and shall not employ any person under him to act as Broker within the said City and Liberties thereof, not being duly admitted as aforesaid, and shall not presume to meet and assemble in *Exchange-alley*, or other public Passage, within the said City and Liberties thereof, other than upon the *Royal Exchange*, to negotiate his business and affairs of Brokerage, to the annoyance or obstruction of any of his Majesty's subjects, or any other in their business or passage about their occasions, then this obligation to be void and of none effect, or else to be and remain in full force and virtue: and the Defendant further said that, in further compliance with the aforesaid Rules and Regulations, he, previous to his Admission as aforesaid to act as a Broker, was required to take and did take an Oath, administered to him by the proper Officer of the said City, which was in the words and figures, or to the purport and effect following; (that is to say,) " I do sincerely promise and swear that I will truly and faithfully execute and perform the office and employment of a Broker, between Party and Party, in all things appertaining to the duty of the said office or employment, without fraud or collusion, to the best of my skill and knowledge: and the Defendant further said that the Bond, so executed by him as aforesaid, had, ever since, been and still was in full force, and that he, ever since the Date of the Bond, had continued in the office or employment of a Broker within the City of *London* and the Liberties thereof; and that all the transactions whereof a Discovery was sought by the Bill from the Defendant took place within the City of *London* and the Liberties thereof; and that, by the said Act of the 6th of

Anne, it was further Enacted that if any Persons, from and after the determination of the then Session of Parliament, should take upon him to act as a Broker, or employ any other under him to act as such, within the said City and Liberties, not being admitted as aforesaid, every such Person so offending should forfeit and pay to the Mayor, Commonalty, and Citizens of the City, for every such offence, the sum of 25*l.* to be recovered in manner therein mentioned: And the Defendant further said that, by another Act of Parliament, passed in the 57th year of Geo. 3, intituled: "An Act for granting an equivalent for the diminution of the profits of the Office of Gauger of the City of *London*, and increasing the Payments to be made by Brokers;" after reciting the said Act of the 6th *Anne*, it was amongst other things Enacted that so much of the said Act as imposed a Penalty of 25*l.* upon every Person who should take upon him to act as a Broker, or employ any Person under him to act as such, not being admitted in pursuance of the said Act, should be and the same was thereby repealed: And it was thereby enacted that, from and after the passing of that Act, if any Person should take upon him to act as a Broker, or employ or cause or permit or suffer any Person or Persons to be employed, with, under or for him, to act as such within the said City and Liberties, not being permitted in pursuance of the said Act therein recited, every such Person so offending should forfeit and pay to the use of the Mayor, Commonalty, and Citizens of the said City, for every such offence, the Sum of 100*l.*, to be recovered by Action of Debt, in the Name of the Chamberlain of the said City, in any of his Majesty's Courts of Record, in which no Protection, Essoign, or Wager of Law, shall be allowed, or any more than one

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Impariment (b). And the Defendant further said that *John Stanley* and *James Hempstead*, who by the Bill were alleged to carry on, and had for several years carried on, the business of Woolbrokers in partnership together and with this Defendant, under the firm of *James Weaver & Co.* had not, nor had either of them been admitted to act as Brokers in pursuance of the said Act of the 6th of *Anne*: and the Defendant further said that he was advised that the Discovery sought by the Bill, as to the matters not answered by him, might subject him to Penalties; and he therefore objected to answer the same, and insisted that he was entitled to the same benefit of objection as if he had pleaded the matters in bar to the said Discovery.

The Defendants *Stanley* and *Hempstead* answered to and admitted the same parts of the Bill as *Weaver* did; and then set forth so much of the 6th *Anne* as relates to the admission of Brokers, and imposes the penalty of 25*l.* on persons acting as Brokers without being duly admitted; and also so much of the 57th *Geo. 3.* as was stated in *Weaver's Answer*; and then concluded thus:—"And these Defendants say that they have not, nor hath either of them, been admitted to act as Brokers, or a Broker, in pursuance of the said Act of the 6th year of the reign of her late Majesty Queen *Anne*; that each and every of the transactions in the Bill mentioned, in respect of which Discovery is sought, took place within the City of *London* and the Liberties thereof; that they are advised that the Discovery sought by the Bill, as to the several matters not already answered by these Defendants,

(b) See 57. G. III. c. 60, sect. 2, Loc. & Pers..

might subject them to Penalties ; and these Defendants, therefore, object to answer the same ; and insist that they are entitled to the same benefit of objection as if they had pleaded the said matters in bar to the said Discovery."

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The Plaintiff excepted to each of these Answers. The Exceptions were thirty-five in number, and embraced the whole of the stating and charging parts of the Bill, except the Allegations which appear, from the preceding part of this Report, to have been answered. The *Master* allowed all the Exceptions : upon which, the Defendants excepted, generally, to the *Master's* Report.

Mr. Horne, and Mr. Pemberton, for the Defendants, in support of the Exception to the Report :—

The Bill is not filed for the purpose of having the Accounts taken between the Parties ; but it states, merely, acts done by the Defendants which are alleged to be a breach of their duty to the Plaintiff, as his Brokers ; and that the Plaintiff has brought an Action against the Defendants to recover Damages for such alleged breach of duty ; and it prays, simply, a Discovery in aid of that Action. The ground upon which the Defendants contend that they are protected from answering is, that if they have conducted themselves as the Bill alleges, they are subject to Penalties, and to a criminal Prosecution. Now it is quite clear that no person is compellable, in this Court, to answer what will so subject him ; and that he may claim the protection of the Court, by Answer, and need not plead or demur to the Bill, unless he so chooses, even in a case which admits of either of those modes of defence.

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The situation of the Defendant *Weaver* is different from that of the two other Defendants. He is a Broker, but they are not Brokers.

1st. With respect to the Defendant *Weaver*.

The 6th *Anne* empowered the Mayor and Aldermen of the City of *London* to admit persons to act as Brokers within the City, under such Rules and Regulations for their good conduct as the Court of Mayor and Aldermen might think proper to make. The Court availed themselves of the power thus given them, and one of the Rules and Regulations which they made was, that every person who should apply to be admitted a Broker should take the Oath which is set forth in the Answer; and another was, that every such person should enter into a Bond, to the Corporation of the City, in such Penalty, and with such Sureties and Condition as are also stated in the answer. Then the 57th *Geo. 3*, recites the 6th *Anne*, and enacts that if any person shall act as a Broker, within the City, without being admitted as required by the recited Act, he shall forfeit the sum of 100*l.* instead of 25*l.*, the penalty imposed by the recited Act. The 57 *Geo. 3*, therefore, recognizes the power given to the Mayor and Aldermen, by the 6th of *Anne*, to make Rules and Regulations as to the admission of Brokers; and, as that Act must be supposed to have been passed by the Legislature with the actual knowledge of the Rules and Regulations which the Mayor and Aldermen had made upon that subject, it is, in effect, a recognition and confirmation of those Rules and Regulations. Now every one of the allegations of misconduct in the Bill, is a violation of one or other of the terms of the Condition of the Bond; for the Defendants are charged with having

concealed the names of their Principals ; with having participated in the Profits of the Sales ; and having got higher prices from the Plaintiff than the real Importer would have done. The Defendants therefore can not be compelled to answer any one of these allegations, as they would thereby forfeit their Bonds, and become liable to pay the penalty.

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Next, the Legislature having thought proper to trust the Mayor and Aldermen with a jurisdiction to make Regulations as to the admission of Brokers, they required an oath to be taken. The authority to impose this oath was afterwards recognized by the 57 Geo. 3 ; and the oath is administered by the Court of Mayor and Aldermen, who certainly have the power of administering oaths, and consequently a violation of it would subject the party to an indictment for Perjury. It is also alleged that the Defendant *Weaver* permitted the other Defendants to act with him as a Broker. As they were never duly admitted as Brokers, an answer in the affirmative to this allegation would subject *Weaver* to the penalty imposed by the 57 Geo. 3.

Next, as to the Defendants *Stanley* and *Hempstead*. They have never been admitted as Brokers. If, therefore, they were to admit that they had acted as such, they would become subject to the penalty imposed by 57 Geo. 3. If then none of these Defendants are compellable to answer as to their carrying on the business of a Woolbroker, they can not be compelled to answer as to their dealings in that capacity.

Besides, it is not necessary for these Defendants to prove that the Discovery sought would subject them to

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penalties, forfeiture, or a criminal prosecution ; it is sufficient to show that it might form a link in the chain, or that it would expose the Defendant to a gross moral reproach. *Baker v. Mellish* (c). *Dolder v. Lord Huntingfield* (d), where what is said, by the Counsel for the Plaintiffs, upon the subject now under discussion, is recognized by Lord *Eldon*, C. in his judgment on the Case. *Shaw v. Ching* (e). *Rowe v. Teed* (f). *Parton v. Douglas* (g). *Franco v. Bolton* (h).

If this Bill had prayed for an Account of the Monies received by the Defendants on the Plaintiff's account, and not for a Discovery in aid of the Action, the Defendants might perhaps have been compelled to answer the Questions which are objected to. But the sole purpose of the Discovery is to recover Damages for fraudulent proceedings ; and the Action is founded on a Tort.

Mr. *Sugden*, and Mr. *Barber*, for the Plaintiff, in support of the *Master's* Report :—

Several of the Allegations in this Bill do not tend in any manner either to criminate the Defendant, or to subject him either to Penalties or Forfeiture, and therefore, might have been answered with perfect safety. According to the argument for the Defendants, a Principal is to have no Discovery from his Broker, because it may subject the Broker to forfeit his Bond, or to a Prosecution for perjury. No Bill calling on a Broker

(c) 11 Ves. 68. See page 73. (d) Ibid. 283. 287.

(e) Ibid. 303. (f) 15 Ves. 372. See particularly p. 377.

(g) 16 Ves. 239, and 19, 225.

(h) 3 Ves. 368; and *Curzon v. Lord De la Zouch*, 1 Swanst. 185. 192.

for an Account of Monies of his employer in his hands, can be sustained, if the argument for the Defendants is to prevail. It is no answer, to a person with whom the Broker has contracted to account, that he has entered into this Bond. An Administrator gives a Bond to secure a due administration of the Assets, but he is nevertheless bound to account to the next of Kin. *Weaver*, by acting as the Plaintiff's Agent, entered into an implied contract to account, and must abide by the consequences, whatever they may be. If the other Defendants are not compellable to answer, any person may act as a Broker, though he has not been admitted, and may escape from the penalty. *Faulder v. Stuart* (i). *Cogamaul v. Verelst* (k). *Nichol v. Verelst* (l). *Shackell v. Macaulay* (m). *Ex parte Dyster* (n). *African Company v. Parish* (o). The Case of *Paxton v. Douglas* does not apply; for here the Defendants agreed to act as the Plaintiff's Agents, and to take upon themselves all the responsibility of that situation.

Mr. Horne, in reply. There is no analogy between the Case of *The African Company v. Parish* and the present one; for in that Case the Defendants were the persons with whom the Company had entered into the Contract. That was not a Case of Penalties, but of Account; for, by the Contract, the Freight was to be of a certain amount, if the Defendant did not trade in certain articles; and of another, if he did. In *Cogamaul v. Verelst*, the question was, whether the Court would grant a Commission to examine Witnesses. That is not the question here.

(i) 11 Ves. 296. (k) 4 Bro. P. C. ed. Toml. 407.

(l) Ibid. 416. (m) 2 Sim. & Stu. 79.

(n) 2 Rose, 349. S. C. 1 Mer. 155. (o) 2 Vern. 444.

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THE VICE-CHANCELLOR:

At this moment I have a strong feeling that the Defendant is not entitled to protect himself, upon the grounds that have been relied upon, from giving the discovery which it is the object of the Bill to obtain. But I will not finally determine the point without looking through the multitude of Cases which exist in the Books. If this Defence is sustainable, the Acts of Parliament which authorize the City of *London* to appoint and control Brokers, and which were intended for the protection of the Trader, will, instead of having that operation, prevent him from detecting the grossest frauds. If some of the doctrine contained in the *obiter dicta* in the Report of *Paxton v. Douglas*, be Law, I cannot reconcile it with the Decision in *Ex parte Dyster*.

THE VICE-CHANCELLOR:

This Case comes on, for judgment, upon Exceptions to the Master's Report. The Master has reported that the Answer is insufficient; and an Exception is taken to that Report.

The facts of the Case are these: The Plaintiff, *Green*, is a Blackwell-Hall Factor, carrying on business in the City of *London*; the Defendants, *James Weaver & Co.*, are Persons who are alleged, by the Bill, to be Co-partners, as Brokers, in the same City. The Bill is filed for a Discovery of Facts, to be used as Evidence in an Action, brought by the Plaintiff against the Defendants, to recover Compensation for Damage sustained by their alleged misconduct as the Plaintiff's Brokers.

The Plaintiff's case may be stated, shortly, thus. In the year 1821, he was a Merchant, in the City of *London*, trading in Foreign Wools. At the same time, the Defendants carried on, in the same City, the business of Brokers in Co-partnership, under the firm of *James Weaver & Co.* In that year the Plaintiff employed the Defendants, as his Brokers, to purchase for him Thirteen Bags of Foreign Wool; and it was a part of the Plaintiff's order, that these Brokers should purchase from the Importers only; the Plaintiff considering it was disadvantageous to buy at second hand. The Bill then states that the Defendants accepted this Agency, and bought the Thirteen Bags of Wool, and delivered with them the usual Broker's note; and they also delivered an Account or Bill of Parcels, but which Bill of Parcels did not specify the name of the Seller. It then proceeds to state that the Plaintiff demanded the name of the Seller, and that the Plaintiff insisted that in all future Bills of Parcels the Vendor's name should be inserted. Upon this requisition the Defendants stated to the Plaintiff that a Mr. *Laidlow* was the Importer and Seller of these Thirteen Bags of Wool, but that he, Mr. *Laidlow*, did not wish his name to appear in the Market. This information satisfied the Plaintiff, and he received the Wool, and paid for it, according to the terms stipulated, between himself and the Brokers, as to payment. With respect to these terms it may be sufficient to observe, without stating particularly the terms of Payment, that they were such as entitled the Plaintiff to expect that he should go into the Market, as a Purchaser, on the best mercantile footing. The Bill then states several other instances of Purchases, made for the Plaintiff, by the Defendants as Brokers, in all of which Purchases the Defendants

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inserted the name of *Henry Kirkpatrick*, as the Seller of these several Parcels of Wool, and that the Plaintiff received and paid for these Parcels according to the stipulated terms. The Plaintiff then alleges that he has since discovered that the representations of the Defendants were false and fraudulent: That *Laidlow* was not the Importer, nor was he the Merchant or the Seller of these Thirteen Bags of Wool: That there was no such Person in existence as Mr. *Henry Kirkpatrick*, who was represented as the Vendor of the other Parcels of Wool; and that the whole of the Defendants transactions, as the Plaintiff's Agents or Brokers (for I take it that Agent or Broker are convertible terms) were bottomed in fraud: That they were a tissue of misrepresentations, from beginning to end; and that they, instead of being mere Brokers, had an interest in and divided the Profits, made from these sales to the Plaintiff, beyond the Brokerage. He then states, in order to recover Compensation for the Damage he has sustained through this misconduct on the part of the Defendants, that he has brought an Action, which is now pending: And, on these allegations, the Plaintiff requires from the Defendants a full and particular discovery of all the transactions wherein they were acting as his Brokers in the purchasing of these Wools; and likewise a disclosure of all Books containing Entries relating to these transactions: And he alleges that he requires that discovery for the purpose of enabling himself to give Evidence in the Action, that Damages may be awarded accordingly.

Upon a Case thus stated, I think that two propositions may be assumed: 1st, That the Policy of the Law not only requires that a Broker or Agent should act

with fidelity to his Employer, and should be ready, at all times, to render a full and clear account of his transactions; but, 2dly, from the nature of this Case, the Defendant must possess, and perhaps exclusively possess, the means of stating that Account, which the policy of the Law entitles the Plaintiff to demand. I think these propositions may be assumed in this Case as clear.

The Defendants have set up separate Defences, but they arrive, in the result, to the same conclusion, namely, that, by giving the discovery, they may subject themselves to penalties, and that a Court of Equity will not compel a discovery which will produce that consequence. The Defendant, *James Weaver*, admits that, at the time of the alleged transactions, the Plaintiff was a Blackwell-Hall Factor in the City of *London*: and this, which is a fact that the Plaintiff might easily prove *aliunde*, is the only substantive fact in which he makes the discovery demanded. As to the other facts, he sets up the statute 6th *Anne*, by which Persons acting as Brokers in the City of *London*, are required to be admitted, as such, by the Court of the Lord Mayor and Aldermen, and under certain regulations for ensuring to their Principals the good conduct of the Broker. But perhaps I had better state the language of the Defendant from the Defence itself.

[His Honour here stated the Clauses of the Acts of Parliament, the Bond, and the Oath set forth in the Answer, and then proceeded as follows:]

He then states that *Stanley* and *Hempstead* and himself carried on business, as Partners and Wool Brokers,

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under the firm of *Weaver & Co.*: That they never were admitted to act as Brokers, and that they are not entitled to act in that capacity; and that this discovery of the facts called for by the Bill, would subject himself not only to the Penalties, but to give evidence against himself that he has been guilty of a breach of his Oath: and, on these grounds, he claims the benefit of the Rule of the Court which prohibits a man from criminat^g or subjecting himself, by his own discovery, to Penalties. The Defence I have now stated is that upon which the Defendant considers that he is entitled to refuse the Discovery.

Now, that the rule of a Court of Equity is, that a man shall not be compelled to Answer to any facts which may tend to criminate him or subject him to Penalties or Forfeitures, is undeniable; but the due application of this Rule to the circumstances of individual cases, has been, at all times, a matter of much controversy; and so much so, that, I believe, not less than one hundred Cases are to be found in the Reports, in which the question was, whether the Defendant was or not bound to give the Discovery sought for. The due application of the Rule to the present Case, is that which I have laboured to arrive at.

If I decide that the Defendants are bound to answer, it may be said that my Decision is inconsistent with the doctrine laid down by great Judges in former Cases. If I decide that the Defendants are not bound to answer, I may render those Acts of Parliament, especially framed for the purpose of protecting Principals from the dishonesty of their Agents, a cover to their Agents in the grossest and most scandalous frauds;

for, strip of the effect of the Statutes, as inflicting Penalties, it would be the common course of the Court of Equity to compel each of these Defendants to state, on oath, whether they were employed as Brokers and Agents of the Plaintiff, and whether they acted in that capacity, and to set forth every particular of each of the Defendant's dealings as Agent or Broker of the Plaintiff, and to produce every entry in his Books, and every Document relating to these transactions. If a Court of Equity, in this Case, protected him from the Discovery, the Plaintiff's proceeding at Law must be quite nugatory; for the materials of evidence must necessarily rest, almost exclusively (as I have observed) in their possession. I hope this question may be decided without my falling into the dilemma of impeaching any anterior Decision. I have looked through every Case on this subject that was cited; and, most especially, I have applied myself to those which were before Lord *Eldon* which have been relied on. I have looked through a great variety of those Cases, and I believe I have looked through and considered every Case that a diligent search in the Books has enabled me to find, that has any bearing on this question. Upon those Cases that I do not now rely on, it may be sufficient to say they establish the general principle, and must protect the Defendant against the Discovery. But, from the current of authority, I think this result may be derived, as established by a series of Decisions, travelling through a long series of years, namely, that a man, by the effect of his own acts, may exclude himself from the benefit of that Rule of a Court of Equity; or, to adopt the expression of a very great Judge, he may contract himself out of the protection afforded by the principle of the Court. The first Case

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that I allude to as establishing that proposition, that a man may so contract himself out of the protection of the Court, is the Case of the *African Company v. Parish* decided in 1691. It was a short Case, as the majority of *Vernon's Cases* are. It is thus: The *African Company* hired the Defendant's Ship to Freight. The Defendant, by Charter-party, as is usual in like Cases, agreed that, if the Defendant traded in Goods the Company dealt in, he would pay such and such particular Sums, to the Company, in respect thereof, that is, in the nature of Forfeiture or Penalties, and deduct such Sums out of the Freight which should be coming to him. The Bill was filed, by the Company, to discover whether the Defendant had or had not traded in any such and what Goods; and the Defendant pleaded the Charter-party, (on which it appears that the Sums therein mentioned were double the value of the Goods themselves, and so were in the nature of a Penalty;) and that he ought not to be compelled to make a Discovery, by Answer, touching the same, so as to subject himself to such Penalties. The short Decision is: "The Defendant must be bound by his own Agreement. Having agreed that it shall be deducted out of the Freight, he ought to discover, it having been adjudged so, several times, in Cases of the *Hon. East India Company* (p)." Now the Note refers to the *East India Company's Cases*, which I have not been able to find. But this Note, short as it is, will appear a little elucidated by Mr. *Raithby's* Edition of that Book, but it is inconsistent with the Principle of other Judges. The next Case that I find is, *The East India Company v. Atkins* (q). That Case was decided about thirty years afterwards,

(p) 2 Vern. 244. (q) 1 Strange, 168; and 1 Com. 347.

in the year 1720; and the language of that Case, in the Judgment, is very important, as to a subsequent part of the present Case. I shall not take up the time of Counsel, by going through, deliberately, the whole series of these Cases; because, the Cases being before them, it will be a waste of time. The short Note is this: "That where a man submits to be examined as to matters which are penal to him, Equity will not interpose." The result, however, is that, in the Judgment in that Case, it will be found, on the reasoning, that a man having contracted to make the Discovery, is bound to do so. The next Case that I consider of importance, is that of the *South Sea Company v. Bumsted* (r), and was decided eight years afterwards, in 1728. The Agreement in that Case was under a similar Contract, by Penalty, not to trade beyond a certain extent, and the Discovery sought was, whether he had violated that Contract. The Objection was, that he should subject himself to Penalties. The Court thought that, as he had covenanted not to plead or demur, he could not then object to the illegality of that Covenant; and that he was bound to make the Discovery. And, in the Judgment there, the Court recognizes the Authority of *The East India Company v. Atkins*.

The next Case is *Wilson v. Prince* (s), which appears to be decided in 1746, but is not reported: but it was cited, by Counsel in argument, before Lord *Hardwicke*; and I give credit to the citation of the Case before Lord *Hardwicke*.

I think, from this series of Decisions, there is sufficient to authorize me to decide that a man may

(r) 1 Eq. Cz. Abr. 77. (s) 2 Vez. 244.

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contract so as to incur the obligation to make the discovery of all the facts relative to that Contract, although the effect of that Discovery may, incidentally, subject him to pecuniary penalties. The reasoning of Lord *Eldon*, in the Cases of *The East India Company v. Neave* (*t*), and *Paxton v. Douglas* (*u*), imply that he assents to the principle, that a man may, by his conduct, incur an obligation to discover the facts, although that discovery may, incidentally, subject him to pecuniary obligations. *Paxton v. Douglas* has been a good deal relied upon by the other side ; and I am free to confess that that Case did perplex me excessively by some of the *dicta* laid down by that great Judge ; for he went there to the extent of stating, not only that a man should not make a discovery that would subject himself directly to Penalty or Criminal Prosecution, but that every question leading incidentally to that conclusion would be likewise equally objectionable. Now when one comes to look at that as a proposition unexplained, one cannot help seeing that the true principle of a Bill in Equity, is that every statement of fact in every Bill ought to be incidentally leading to the same conclusion, ultimately, as the prayer of the Bill does lead to ; for the fact is either conducive to the general result, or it is unimportant and irrelevant. But I take Lord *Eldon* to have meant, (and which perhaps is not very fully explained in the Report, and which satisfied my mind a good deal,) not that every fact which may lead to the effect of subjecting a defendant to a penalty, is objectionable ; but, where the sole gist and object of the Suit is to convict a man in a penalty, where there would be no other purpose but to have relief in a Court of Equity

on the footing of penalty, that, as a Court of Equity does not relieve on penalty, it will not give any incidental discovery. That is the way I reconcile and get rid of the *dicta* laid down in *Paxton v. Douglas*. But, however, when one looks at what Lord *Eldon* did, in point of declaration, in the other Cases, and most especially in the Case of *Ex parte Dyster* (x), one cannot help thinking that he could not have intended to lay down the doctrine in a general, unrestricted manner. The Case came on upon a Bankrupt petition to prove a debt against a certain Bankrupt's Estate. The objection in answer to the Petition, was that, as the petitioner traded as a Principal, at the same time as he was acting as a Broker and participating in brokerage profits (which the Law prohibited) therefore the Law would not permit proof to be made of profit acquired by such trading. Lord *Eldon* throws out a suggestion that he has nothing to do with the Act, so far as it respects transactions between the broker and the City of *London*; and he permitted the debt to be proved. Now it cannot be doubted that, if he admitted the debt to be proved in that Case, the Discovery sought by this Bill ought to be made.

Then the next question is, inasmuch as the objection to make the Discovery arose, in the Cases I have referred to, from the stipulations of instruments under seal, can the solemnity of the seal make that obligation to discover more obligatory in a Court of Equity, than the moral obligation resulting from Principal and Agent, when one reposes and another accepts the confidence so reposed? The reasoning of the Judgment, in the Case of the *East India Company v. Atkins*, I think

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shows, conclusively, an opinion that such was the moral obligation that on that ground the Discovery ought to be made. Although *Strange* is not a book we can place much confidence in, yet, in this particular instance, it appears to be a very able and sound Judgment, and well reported. I should say that a Court of Equity knows no difference between a mere moral obligation, and one resulting from stipulation by deed.

If we contrast the circumstances of this Case with those of the Decisions I have referred to, I think we shall find that this Case creates a higher moral obligation to give the discovery than any of those Cases. In each of those Cases the Parties dealt at arm's length. The employer contemplated a breach of the Contract by the Agent, and stipulated for his own damages in case a breach of Contract should take place. In the present Case the employer surrendered himself, unconditionally, to the Agent whom he employed, in the confidence that the agent sustained the character that he publicly assumed. The employer had no reason to suspect, nor had any means of detecting the misrepresentation of the fact, whether they were, or not, duly constituted legal Brokers. Much less could he apprehend that they were daily and hourly living in the violation of the Law of the Country in so acting, and that they kept this violation lurking in the back ground, to be brought forward, by way of defence, against the just demands of those whose confidence they invited and abused. If a Court of Equity gives effect to a defence so constituted, I do not know that there can be any reason why an Executor or Administrator, who has made oath duly to administer the Assets, and executed a bond for that purpose, may not allege those matters in answer to a Bill of Disco-

very charging him with fraudulently tendering an account of the Assets. This is the ground upon which I act.

I may here guard myself by stating that it is always with reluctance that I have used expressions which may cast imputations on the Parties; and, from this place, forbearance is most especially to be observed. But the reasons on which my decision is founded, constrain me to assume, though hypothetically, that the defence against a Discovery in this Case arises from the motives I have stated. A Demurrer admits every fact charged in the Bill to be true, a plea does the same, except in so far as every fact is especially traversed. This particular defence (which is neither Plea nor Demurrer) must be governed by the Rules which apply to Demurrer and Plea: I am, therefore, justified in assuming the truth of the facts charged in the Plaintiff's Bill. If an answer be given, satisfactorily rendering an account and denying the imputed frauds, the hypothetical assumption of the fact by the Court in the present discussion, will fall to the ground, and leave no imputation on the Defendants.

Considering the vast importance of the present Case to the great commercial interests of the country, I have thought it best to hazard a judgment on the broad principle of the contest, instead of getting rid of the Case on the technical distinction. But, in point of form, I think the Exception to the *Master's Report* could not have been sustained.

The Plaintiff has taken Thirty-five Exceptions. The *Master* has allowed them all. The Exception to the

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Master's Report is single. The Plaintiff, by that Exception, avers that the *Master* ought to have over-ruled every one of those Exceptions. Now, if it can be shown that there is more than one of those Thirty-five Exceptions which may be allowed against the Defendants, without either subjecting themselves to penalties, or without impeaching that Rule of Lord *Eldon's*, taking the Rule in its most unlimited extent, still then, in point of form, the present Exception cannot stand. If this Case rested on the form only, I am free to confess that on that consideration, I should give to the Defendants the opportunity of amending their Exception. Having, however, given my opinion on the broad principle, (with an anxious wish to be set right if I mistake the principle of the Court) I will do no more than overrule the Exception to the *Master's Report*, and direct the Defendants to answer, and give the deposit to the Plaintiff.

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BEFORE THE

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LUSHINGTON v. SEWELL.

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21st, 25th, and
27th June;
and 29th Oct.

Will.
Construction.
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Estate.
Heir & Executor.

MATHEW GREGORY LEWIS, Esq. made his Will, dated the 5th of June 1812, and thereby gave to his Mother, *Fanny Maria Lewis*, an Annuity or yearly rent-charge of 1,000*l.* during her Life, to commence at his Decease, and to be paid, half yearly, out of his Plantations or Sugar-works, Penns, Lands, Slaves, Tenements and Hereditaments in the Island of *Jamaica*; and, subject to the said Annuity, he gave, devised and

trust, as to one Moiety, for *A.* A Testator gave all his Real and Personal Estate to Trustees in

devised and devised and trust, as to one Moiety, for *A.* for life, with Remainder to her Children; and, as to the other Moiety, for *B.* and her Children in like manner. By a Codicil he declared that his Estates should not be divided equally between *A.* and *B.*, but in proportion to the number of their Children; and he left *A.* and *B.*, jointly, his residuary Legatees. By another Codicil, in order to prevent disputes, he gave one of his Estates to *A.* and her Heirs, and the other to *B.* and her Heirs, the number of their Children nearly equalizing the value of the two Estates. In a subsequent Codicil he mentioned that he had bequeathed the first Estate to *A.* and her Children, and the second to *B.* and her Children: held, that *A.* and *B.* were entitled to these Estates for their Lives only, with Remainders to their Children; and that they were not entitled to the Personal Estate, absolutely, but for their Lives only with Remainders to their Children, and in shares proportioned to the number of their Children.

If an Estate descends subject to a Mortgage, and the Heir creates a new Mortgage for securing the old Debt and also one contracted by himself, and fixes a new day of payment, he makes himself liable to both Debts, notwithstanding he exempts, in the new security, his Person and his Property, except what is comprised in the new Mortgage from liability in respect of the Debts.

Semblé, that by a devise of a West India Plantation, the Stock, Implements, Utensils, &c. upon it, will pass. *in 3 Sem 398*

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bequeathed all his said Plantations or Sugar-works, Penns, Lands, Slaves, Tenements and Hereditaments in the Island of *Jamaica*, and all the Cattle, Mules, live and dead Stock, Plantation Utensils and Implements, and instruments of Planting and Husbandry, and all other Property and Effects upon or belonging to the said Plantations or Sugar-works, Penns and Lands; and all the rest, residue and remainder of his Estate real, personal or mixed, in possession, remainder, reversion, expectancy or otherwise howsoever, unto and to the use of *William Luther Sewell*, and *Robert Sewell*, Esqrs. and *Cyril Jackson*, D. D. their Heirs, Executors, Administrators and Assigns, according to the different nature and qualities of the Premises respectively, upon Trust to manage, cultivate and improve all his said Plantations or Sugar-works, Lands, Tenements and Hereditaments in *Jamaica*, to the best advantage; and, for that purpose, from time to time, to support, repair and keep up all the Works and Buildings upon the said Plantations, Penns and Lands, and erect new Works or Buildings when necessary, and also, from time to time, to purchase and put upon, provide and supply his said Plantations, Penns and Lands with all and every such Slaves, Cattle, Stock, and other matters and things which might be necessary for the keeping up, supporting and improving the same; and also to hire, for the use of the said Plantations, Penns and Lands, such Slaves as they, in their discretion, should think proper, or make good Leases or otherwise, all which outgoings he directed should be deemed and considered as annual contingencies in the respective years in which the same should be incurred; and, as soon as might be after his Decease, to convert all his Personal Estate, in Great Britain, which should

not consist of Monies, Stocks in the Public Funds, or good Securities, into Money, and to lay out and invest all the Monies to arise therefrom, and all the Monies he should be possessed of at the time of his Decease, in the Public Stocks or Funds, or on good real Security in England, and to pay over one Moiety of the clear net proceeds, rents, issues and profits, interests and dividends of his said Plantations or Sugar-works, Penns, Lands, Slaves, Tenements and Hereditaments in *Jamaica*, and of all the Slaves, Cattle, Stock and other Effects upon or belonging thereto, or from time to time to be upon or belonging thereto, and of the Personal Estate in Great Britain converted or to be converted as aforesaid, unto his Sister *Fanny Maria Lushington*, Wife of Sir *Henry Lushington*, Bart. for her life, for her separate use, and, after her decease, to convey, assure, assign and make over one full moiety or equal half part undivided of all his said Plantations or Sugar-works, Penns, Lands, Slaves, Hereditaments, Cattle, Stock and other Effects upon or belonging to his said Plantations, Penns and Lands, and of all his Residuary Real and Personal Estate, unto the use of all the Children of *Lady Lushington* who should be living at the time of her Decease, equally to be divided between them, as Tenants in Common, and not as Joint-tenants, and their respective Heirs, Executors, Administrators and Assigns, with Cross Remainders between them, and, if there should be but One such Child, then wholly to such Child, his or her Heirs, Executors, Administrators and Assigns. The Testator declared similar Trusts as to the other Moiety, for the benefit of his Sister *Sophia Elizabeth Sheldon*, Wife of Lieutenant Colonel *Sheldon*, and her Children; and he appointed *William*

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Luther Sewell, Robert Sewell and Cyril Jackson, the Executors of his Will.

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The Testator made the following Codicils to his Will. The first commenced thus: "There will probably be found a Will;" over which was interlined: "It has been destroyed since writing the following." It then proceeded: "made many years ago, as also another Will made since my Father's death. If any thing contained in this Codicil should be contradictory to any part of these two Wills, it is my injunction that the preference should be given to this Codicil, and to the second Will before the first. In other respects I mean the instructions contained in those Wills, as to the dispositions of my Property, are to stand good. I possess, besides my two Estates in *Jamaica*, some thousand pounds still in the hands of my Father's Executors, probably six or seven thousand pounds." The Testator then, after giving several legacies, and devising his Chambers in the *Albany* to the honourable *T. Stapleton*, expressed himself as follows:

"As I leave no debts, or very trifling ones, of any kind, I presume that there will be ready money enough to discharge all these Legacies, all of which I desire to be paid with the greatest possible dispatch; but, if there should not be ready Money enough in hand, I then direct that the Deficiency should be supplied by annually setting aside the one-half of the clear Profits of my Estates in *Jamaica*, till the whole shall have been discharged, till when the Legacies are to be discharged proportionally. It is my intention that my Estates which I have bequeathed to my Sisters, should not be

divided equally between them, but in proportion to the number of their Children at the time of my Decease.

“ *M. G. Lewis.*”

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“ I leave my two Sisters, jointly, my residuary Legatees.

“ *John Hatchard.*

M. G. Lewis.”

“ *John Hatchard, jun.*

“ *Benjamin Woodobrow.*”

“ To prevent Disputes, I leave to my eldest Sister, Lady *Lushington*, and her Heirs, my Estate of *Cornwall*, in *Jamaica*, and to my youngest Sister, Mrs. *John H. 1827* *Sheddon*, and her Heirs, I leave my property in the Estate of *Hordley*, in *Jamaica*, the numbers of their respective Children nearly equalizing the Value of the two Properties.

Nov. 1st, 1815 (a).

M. G. Lewis.

“ *John Hatchard.*

“ *Thomas Hatchard.*

“ *John Kelly.*”

The Testator made another Codicil, dated *Maison Diodati, Geneva, August 20th, 1816*: and, with a view to ameliorating the condition of his Negroes, ordered that whoever should be in possession of his Estate of *Cornwall*, after his death, should, if a Man, pass three months in *Jamaica* every third Year, either in person

(a) The first Codicil had no date. The signatures and names of the Witnesses are inserted to show that the instruments were intended to be distinct.

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or by deputing his Son or one of his Brothers ; and, if a Woman, that she should perform the condition either in person, or by deputing her Husband, her Son, or one of her Brothers, and that nothing should dispense with the performance of this condition except a legal impossibility, in which case the condition should be complied with in the succeeding year, or as soon as it should be possible for the Holder of the Estate to fulfil it. But should the Holder of the *Cornwall* Estate suffer three years to elapse, without fulfilling the condition, and without being prevented by any legal impossibility, then he declared the Estate to be forfeited to the next Heir, who should receive it under the same condition, and, under the same Penalty or Forfeiture, to the next Heir again, and so to pass on, from Heir to Heir, till the Estate should fall into the hands of a person who was willing to hold it on the above condition.

The Testator then proceeded thus :—" I have bequeathed my Estate of Cornwall to my eldest Sister, and to her Children after her death. If no one of these Persons will accept it on the above Conditions, or neglect to fulfil it after acceptance, then I declare the Estate to be forfeited to my youngest Sister, and to her Children after her death, upon the same Conditions. If no one of these Persons also will fulfil this Condition, then I declare the Estate to be forfeited to that one of my next legal Heirs who shall be willing to perform it; to be forfeited by him or her also upon non-performance. I bequeath my Estate of Hordley to my youngest Sister and to her Children after her death, upon exactly the same Condition, of passing Three Months in Jamaica once in every Three Years, which I have above imposed

respecting *Cornwall*. And if no one of these Persons performs this Condition, then I declare *Hordley* to be forfeited to my eldest Sister, and to her Children after her death, upon the same Conditions; and, if those Conditions are not fulfilled, then *Hordley* (as well as *Cornwall*) shall pass to my next legal Heir who will perform them. Whether I possess the whole or only the half of *Hordley* at the time of my death, I declare that the more or less shall make no difference. In that case, I bequeath the whole of *Hordley* to my youngest Sister, and to her Children after her death; but I charge it with 15,000*l.* to be equally divided between the Children of my eldest Sister; to which purpose, one half of the clear profits of *Hordley* shall be devoted till the whole 15,000*l.* shall have been discharged. I also declare that any Person who may infringe those Regulations which I have laid down for the benefit of the Negroes on my Estates in *Jamaica*, or who may dare to diminish the Comforts and Indulgences allowed them by me, shall forfeit his or her interest in those Estates. I positively forbid the sale of any Negro or Negroes who may belong to me at the time of my death. I hereby attach my Negroes to the Estate to which they may belong at that period, but allow them to be set Free: And I declare that any Person or Persons who shall dare to disobey this Order, to have forfeited his or her or their interest in my Estates in *Jamaica*; and I pronounce such Sales to be void. I declare that the above Conditions are in every respect intended by me to apply to whatever Property in *Jamaica* may be possessed by me at the time of my death, as well as to those Estates which are in my possession at this moment."

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The Testator made another Codicil, dated, *Cornwall House*, February 24th 1816, containing Directions as to the Holidays to be given to the Negroes on the *Cornwall Estate*; and another Codicil, dated, *Maison Diodati, Geneva*, August 23d 1816, by which he directed that, if the Disposition of his *Jamaica Estates* made upon the 20th of August should be found unintelligible or impracticable, they should be given in Trust to the *Lord Chancellor* for the time being, who was to appoint a Person to reside upon each of them, to protect the Negroes from oppression. For doing which, he was to receive such a portion of the Profits of the Estate as the *Lord Chancellor* should think a recompence; and that the Remainder should be distributed among his Sisters and their Children, in such Proportions as the *Lord Chancellor* should think most just and beneficial; and that no Negroes should be sold off his Estates, nor removed, except by their own express desire.

The Testator, at the time of making his Will, was seized in fee of a set of Chambers in the *Albany*; of a Plantation in *Jamaica*, called *Cornwall*; of 600 Acres of Waste Land in the same Island; and of an undivided Moiety of another Plantation there, called *Hordley*.

By an Indenture, dated the 8th of March 1766, the *Cornwall Estate* was charged, by *William Lewis*, the late Grandfather of the Testator, with the payment to *Thomas and Stephen Fuller*, of 8,000*l.* and Interest.

By Indentures, dated the 19th and 20th of December 1791, after reciting that the original Debt, with other Sums advanced, amounted to 20,198*l.* 6*s.* 11*d.*, the

Executors of *William Lewis*, together with the *Fullers*, conveyed the *Cornwall Estate* to *Richard Watt*, by way of Mortgage, for securing to him the repayment of the last-mentioned Sum and some further advances, amounting in the whole to 24,000*l.*, with Interest.

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By an Indenture, dated the 25th day of April 1807, the mortgaged Premises were conveyed, to *Philip John Miles*, subject to the Proviso for Redemption contained in the Indenture of the 20th of December 1791.

By an Indenture, dated the 20th of May 1813, the Testator confirmed the last Mortgage, subject to a Proviso that his Person and Property, except the *Cornwall Estate*, should not be liable to the Payment of the Mortgage Money and Interest. On the 31st of October 1817, the Testator agreed to Purchase, of *George Scott* and *Mathew Henry Scott*, the other Moiety of the *Hordley Estate*, for 32,000*l.* to be paid and secured by *T. and J. Plummer*, on the Testator's behalf, as follows: 16,000*l.* on the 30th of June then next, and the Remainder by three Annual Instalments, and to be secured by the Bond of *T. and J. Plummer*; but the Testator, or any other Property of his, was not to be responsible to the *Scotts*, for the Purchase Money, or to the *Plummers*, for what they might advance in respect of it.

By an Indenture, dated the 31st of October 1817, made between the Testator of the one part, and the *Plummers* of the other part, after reciting the agreement, and that the *Plummers* had agreed to pay off the Mortgage Debt of 24,000*l.* and the Interest then due to *Miles*, and to pay the 32,000*l.* to the *Scotts*, and that, to secure the Repayment thereof, the Testator had

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agreed to execute to the *Plummers* a Mortgage of *Cornwall* and of his Moiety of *Hordley*, and that the other Moiety should, on the completion of the Purchase, be conveyed to the *Plummers*, in fee, by way of Security for their Advances in respect of the Purchase, and that it had also been agreed that, during the Testator's Life, his Person and all his Property out of *Jamaica* were not to be subject to the Payment of the Monies advanced or to be advanced by the *Plummers*, the Testator conveyed the *Cornwall* Plantation, subject to the Mortgage for 24,000*l.*, and his Moiety of the *Hordley* Plantation, to the *Plummers*, in fee, subject to a Proviso for Redemption on Payment by the Testator, in his Life-time, or by his Heirs, Executors, &c. within Six Months after his Decease, of all such Sums as the *Plummers* should pay in discharge of the 24,000*l.* due to *Miles*, or of the 32,000*l.* to the *Scotts*, or on account of the *Cornwall* Plantation, or of the Testator's Moiety of *Hordley*, or of the other Moiety agreed to be purchased, or to or on account of the Testator, his Heirs, Executors, &c. with Interest, at Six per Cent.; and the Testator covenanted, with the *Plummers*, that his Heirs, Executors, Administrators, or Assigns, would, within Six Calendar Months after his Decease, pay to the *Plummers* all such Sums as should be advanced by them in discharge of *Miles's* Mortgage, or should be paid by them to the *Scotts* in respect of the 32,000*l.* agreed to be given for the Purchase of the Moiety of *Hordley*; and also all such Sums as should at any time thereafter become due to the *Plummers* for any Advances they might make for the Management or Cultivation of the Plantations, or otherwise, on the Testator's account; and also that the Testator's Heirs, Executors, or Administrators, should, within Six Calendar Months after his Decease pay, to the *Plummers*,

Interest, for the same several Sums, at Six per Cent. And the Deed also contained a Covenant, on the part of the Testator, to consign the Produce of the Plantations to the *Plummers*, so long as any thing should remain due to them, in trust to Sell, and out of the Proceeds to pay the Amount of the Contingencies that they might furnish, and to retain such Sums as they might Advance, or pay or become liable to, for or on account of the said Plantations, Moieties, and Premises, and to indemnify themselves against all Sums of Money which they should become liable to pay in pursuance of any Bill of Exchange to be drawn from the Island of *Jamaica* on account of the Estates, and then to reimburse themselves the Interest due on the Sums owing to them in respect of any Payments or Advances which should have been made by them on any of the accounts before mentioned, and to pay over the Surplus Proceeds of the Consignments to the Testator ; provided that, after the Testator's death, all the Monies to be produced from the Consignments should be applied in Payment of all the Principal Monies to become due to the *Plummers*, on any of the accounts aforesaid, and the Interest thereof : And the Indenture also contained a Proviso that nothing therein contained, or in a Bond of even date, should make the Testator personally liable, during his Life, or any of his Property, except the Produce of the Moiety of *Hordley*, contracted to be purchased (which it was thereby agreed should be applied in Liquidation of the Purchase Money, and then of the other Advances made by the *Plummers*), liable to the Payment of the Sums thereby secured. The Testator executed, at the same time, a Bond to the *Plummers*, conditioned to be void on Payment, by his Representatives, within Six Months after his Decease, of the Sums secured by the last Indenture.

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with ; and that the Moiety of the Stock and Personal Chattels and Effects belonging to the undivided Moiety of *Hordley*, was subject to the Trust of the Will.

Sir Henry Lushington, by his answer, said that so much of the Testator's Will as related to the disposition of the Plantations, and the Slaves and Stock thereon, was revoked by the Codicil of the 1st of November 1815; and that, by virtue of that Codicil, the Plaintiff was entitled to an Estate in fee in the *Cornwall* Plantation and the Slaves thereon, and absolutely entitled to the Stock and Effects belonging thereto ; and he claimed such Right and Interest in the said Plantation, Slaves and Stock, as he was entitled to by his marital Rights.

Colonel *Sheddon*, who had taken out Letters of Administration to his Wife, who died after the institution of the Suit, claimed, by his answer, to be Tenant by the courtesy of all the Testator's Real Estates in which his late Wife took an Estate of Inheritance, either as Devisee or as one of the Co-heirs, and to be entitled to such parts of the Personal Estate as his late Wife was entitled to, and to the Implements and Crops which were on such parts of the Estates as it might appear that his late Wife was entitled to for her Life only.

Mr. Sugden and Mr. Pemberton, for the Plaintiff :—

The first Question is, out of what Fund the Arrears of the Annuity of 1,000*l.* given by the Will to the Testator's Mother, must be paid. It is clear that, as the Testator has directed this Annuity to be payable out of all his Plantations or Sugar Works, Penns, Lands, Slaves, Tenements and Hereditaments in the Island of *Jamaica*,

the Arrears must be paid out of the Plantations of which the Testator was seized, *pro rata*.

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The next Question is what interests the Testator's two Sisters take in the Real and Personal Estates. By his Will he makes his Real and Personal Estates one general Fund, and as to one Moiety of that Fund he declares Trusts for the benefit of Lady *Lushington*, for her Life, and after her decease, for her Children living at her decease ; and he declares similar Trusts, as to the other Moiety, for the benefit of Mrs. *Sheddon* and her children ; and he attempts to create cross-remainders between the Children of both those Ladies ; but as he had before disposed of the Fee, there can be no cross-remainders. If this had been the only testamentary disposition, there would have been no difficulty in deciding upon the Rights of the Parties. But then we come to the second Codicil, in which the Testator says that it was his intention that the Estates (meaning the Real Estates) which he had bequeathed to his two Sisters, should not be divided equally between them, but in proportion to the number of their Children at his decease ; and then comes this important line : " I leave my two Sisters jointly my residuary Legatees." This revokes the disposition of the Residue, contained in the Will, and substitutes for it a disposition to the two Sisters as Joint-tenants. Now it is perfectly clear that the Testator intended to dispose of something. By his Will he had made a disposition of the whole of his Personal Estate, as well as of the whole of his Real Estate. There was, therefore, no property excluded out of the Will to which that Clause in the Codicil could apply. Now if there be two Clauses in different

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Instruments, and the Clause in the latter is inconsistent with that in the former, it must, of necessity, in order to have any operation, operate as a revocation of the Disposition contained in the former Clause. If the Residuary Clause in the Will did not dispose of the whole Personal Estate—if there is any thing that would satisfy the bequest in the Codicil, it might be contended that the Testator did not intend to alter the Disposition which he had already made of his general Personal Estate. But it is impossible to adopt that Argument, because the Will contains a Disposition, in the most ample and unqualified terms, of the whole of his Real and Personal Property; so that, in order to give any effect to the Words in this Codicil, it is perfectly clear that the Court must construe them in their most extensive sense, that is, consider them as having revoked the Disposition made of his Residuary Estate, by his Will, and substituted a new Disposition for the benefit of the two Ladies. It is clear that when the Testator made this Codicil he intended to alter, most essentially, all the Dispositions he had made in his Will, except that which gives an Annuity to his Mother, and to make an entirely new disposition of his Property. Accordingly, the whole of the Real Estate, with the exception of the 600 Acres of Waste Land, is otherwise disposed of by this Codicil. The *Albany Chambers* are given, for Life, to Mr. *Stapleton*; and the whole Residue of the Real Estate is given to Lady *Lushington* and Mrs. *Sheddon*, in proportion to the number of their Children. With respect to the Residue of the Personal Estate, if the Court should think that the two Legatees were not Joint-tenants but Tenants in common of it, then we submit that the Testator intended that they should take

it in Shares proportioned to the numbers of their Children, and consequently Lady *Lushington* will be entitled to two thirds, and Mrs. *Sheddon* to one third.

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The Testator then gives his Estate of *Cornwall* to Lady *Lushington* and her Heirs, which gives her the Fee in this Estate, and in the Slaves belonging to it. It is clear that the Slaves passed with the Estate. By the Law of *Jamaica*, they are Real Estate: and a subsequent Codicil directs that the Slaves shall not be removed from the Estate. But the Stock and Effects on the Plantations do not pass with the Plantations, unless there is some Law in *Jamaica* which makes a distinction between such Chattels and the Stock and Effects on a Farm in this Country. [The Vice-Chancellor: May there not be some sense attached, by usage, to the Word "Plantation," so as to make it include the Articles in question?] Under a Devise of a Plantation there is no greater convenience in holding that the Stock and Effects upon it pass, than there would be in holding that, under a devise of a Farm in this country, the Horses, Carts, and other Implements would pass.

The only Words upon which an Argument can be founded in support of the interest claimed for the Children of Lady *Lushington* and Mrs. *Sheddon*, are those in which he directs that in all other respects the conditions of the former Bequest are to be adhered to. But there are other conditions to which this direction may be applied. When, however, we look at the Codicil of the 20th August 1820, it must be admitted that Lady *Lushington*'s Claim to the Fee in the *Cornwall* Estate is considerably shaken, and that she must be

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content with being either Tenant for Life, or, at the utmost, Tenant in Tail of that Estate.

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Next as to the regulations which the Testator has made in this Codicil, for ameliorating the condition of his Slaves. All the conditions which the Testator has, with this view, imposed upon his Devisees, are void in all respects; as it is an attempt to create a perpetual Obligation and Condition. [The *Vice Chancellor*: Is not the Condition good for the life of the Tenant for Life?] It might have been good if it had been so restricted; but it is not. The whole provision is one entire Clause. And Lord *Eldon*, C. decided in *Marshall v. Holloway* (b), that, where some of the Limitations in an Instrument are good, and some bad, the latter can not be separated from the former, but that they are void *in toto*. *Lord Southampton v. Marquis of Hertford* (c) is an authority to the same effect.

The debt of 24,000*l.* was, we admit, originally created by the Testator's Grandfather. But the Testator, by his subsequent transactions, made that debt his own. For he blended it with monies that he himself borrowed. He entered into a new contract, fixed a new time of payment, and so made it entirely his own personal debt. Although he was not liable, even by the Deed of 1813, to pay this 24,000*l.* by the effect of the subsequent instruments he became bound to pay it. He borrowed 24,000*l.* in order to pay off *Miles*, and engages to repay, not only this sum, but a further sum of 32,000*l.* which he borrowed for the purpose of purchasing the undivided Moiety of the *Hordley* Estate; and then he agrees

(b) 2 Swanst. 432.

(c) 2 V. & B. 54.

with the vendors, not that they shall take, as their security, a transfer of *Miles's Mortgage*, but that he will make to them a new Mortgage, not of that Estate alone, but of the *Cornwall Estate*, his own Moiety of the *Hordley Estate*, and the other Moiety which he had agreed to purchase. Then, instead of the *Cornwall Estate* being subject to the same Equity of Redemption as it was before this transaction, he engages that this Estate shall be subject to a Redemption within six months after his own death, on payment by his representatives, not of the 24,000*l.*, but of the whole of the advances which the *Plummers* had agreed to make to him, personally and individually, and he enters into a Covenant and gives a Bond for further securing these advances. *Donisthorpe v. Porter* (*d*).

The cases in which the Personal Estate of the owner of land subject to a Mortgage, is not liable to pay the debt, are where the land descends or is purchased subject to the debt, or where the owner, on the Mortgage being assigned, covenants to pay the debt. *Coventry v. Coventry* (*e*), *Evelyn v. Evelyn* (*f*), *Tweddell v. Tweddell* (*g*). But wherever there is a new Contract between the owner of the land and the lender of the money, and a new Equity of Redemption is reserved, the Court will put a different construction upon the acts of the parties, and hold the debt to be followed by all the usual consequences of a debt (*h*), *Woods v. Huntingford* (*h*). In *Waring v. Ward* (*i*), Lord *Eldon*, C. seems to sanction the rule as

(*d*) 2 *Eden.* 162. (*g*) 2 *Bro. C. C.* 101 & 152.

(*e*) 2 *P. W.* 222. (*h*) 3 *Ves.* 128.

(*f*) *Ibid.* 659. (*i*) 5 *Ves.* 670, and 7, 332.

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laid down by Lord *Alvanley*, M. R. in the preceding case. The case of *The Earl of Oxford v. Lady Rodney* (*k*) is precisely in point, and is an express authority for deciding this question in favour of the Plaintiff. The Deed of October 1817, contains an express recital of a Contract, between the Testator and Messrs. *Plummer*, for the loan of the money to the Testator; and there is a new Mortgage made, and a new day of payment named; and the sum lent is much greater than that originally borrowed. The 32,000*l.* was clearly a Personal debt of the Testator: no distinction is made between that sum and the 24,000*l.* The repayment of both those sums is provided for in the same way, both of them are secured by the same Bond. This is not a case in which Mr. *Miles* wished to have his money paid off. In all probability he would have been glad to let it remain, as it drew after it the Consignments of this very large Property. The fund, therefore, which is first applicable to pay this debt is the Testator's general Personal Estate. The next is the descended Estate, namely, the moiety of the *Hordley* Plantation, which the Testator purchased after the date of his Will; and the last, the devised Estates.

But if the Court should think that the personal Estate is not applicable to the discharge of this debt, but that the burden must be borne by the Estates on which it was originally charged, then, as the Testator has declared that his Estates should not be divided equally between his two Sisters, but in propor-

(*k*) 14 Ves. 417. Upon the question here discussed, see Mr. Eden's Note on the Case of *Donisthorpe v. Porter*, in the 2d vol. of his Reports, p. 164; and the Notes by Mr. Cox and the last Editors, 2 P. W. 664, 5.

tion to the number of their Children, the Court is bound so to apportion the debt between the two Estates as to effectuate the Testator's intention. The Testator never treats the debt as a charge upon the *Cornwall* Estate exclusively. By his Will, he gives that and the *Hordley* Estate, together with his personal Estate, to Trustees in Trust, as to one Moiety for Lady *Lushington* and her Children, and as to the other Moiety, for Mrs. *Sheddon* and her Children. So that each class of *cestuis que Trust* would have borne half the Debt. When the Testator comes to the second Codicil, he says, that the Estates shall be divided between his Sisters in proportion to the number of their Children. This would have thrown the 24,000*l.* over both the Estates. He then takes upon himself to make the division, which is merely a completion of his intention expressed in the Second Codicil. The Plaintiff is therefore entitled to have this Debt thrown upon both these Estates.

As to the 32,000*l.* paid for the Moiety of *Hordley*, the Testator made that Moiety a security for the Purchase Money. That Moiety, therefore, being itself pledged for the Debt, must bear its own burthen, and be the primary fund for payment of the Debt.

The VICE-CHANCELLOR:—

There is some doubt in my mind whether the Plantation Implements and Utensils could be attached to the Personal Estate: and I am inclined to think that there is a sense annexed to the word "Plantation" which makes it include the Implements and Utensils.

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The reason for holding that the Implements and Utensils pass under the devise of the Plantation, is founded on convenience only: and, upon that principle, it might be contended that the furniture in a house upon the Plantation would pass, as it is very inconvenient to have a house without furniture, or that by a devise of a Farm the Implements of Husbandry used in its cultivation would pass.

[The VICE-CHANCELLOR:—

Suppose it had been a devise of the Plantation with its appurtenances?]

The word appurtenances would be satisfied by holding it to mean that which is appurtenant to the Plantation, as Real Property, and would not include what is Personal and not Real Estate.

If a Testator devise his Farm as it is then in his possession, it is quite clear that not one single item of Personal Estate would pass. When he speaks of his Farm in his possession, he is speaking of a quantity of Land in the course of cultivation. Besides, we do not contend that the Plantations are to be stripped of their Mills and Furnaces, or of any thing else that is attached to the Freehold. All that we contend is, that live Stock and Implements of Cultivation and Property of that description, which is not in any sense annexed to the Freehold, do not pass under the devise of the Plantation. Now, unless there is some express law in Jamaica which introduces a distinction between the construction put upon the words in question, in that Island, and in this Country, there can be no doubt upon this point, unless words are found in the

Testamentary Instruments which annex these particular articles to these particular Estates.

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[The Vice-Chancellor:—

Although positive enactment may not have done it, may not ordinary usage have some effect ?]

If in the Island there is a particular sense put on particular words, that must be by the decision of the Courts, and not by the general understanding of mankind as to the Law. Wherever a Plantation is conveyed, the Slaves, Stock and Implements are mentioned, for the purpose of passing what would not pass under the devise of the Plantation.

Mr. Kindersley, for the defendant Sir *Henry Lushington* :—

As Sir *Henry Lushington* may survive Lady *Lushington*, it is important for him to contend that his Wife took an Estate of Inheritance, and not for Life only, in the Testator's Estates, as he will then be entitled to be Tenant by the courtesy of that Property.

It must be admitted that, under the Will, Lady *Lushington* would be entitled to the Rents of a Moiety of the *Cornwall* Estate, and of a Moiety of a Moiety of the *Hordley* Estate, for her separate use, for her life. By the first Codicil, the Testator, who had then learnt that Lady *Lushington* had a greater number of Children than Mrs. *Sheddon*, divided his Property between them in proportion to the number of their Children. There can be no doubt that, if this Codicil stood alone, there would be no alteration in the quantity of estate which

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Lady *Lushington* was to take. Then the second Codicil revokes the former devise of those Estates, and gives Lady *Lushington* an Estate in Fee-simple. The direction that the conditions of the former bequests should be adhered to, had reference to the charge of 1,000*l.* a year in favour of the Testator's Mother. It may, perhaps, be contended that another of the conditions that were to be adhered to was, that Lady *Lushington*, so long as she lived, should have the Estates for her separate use. Still that would not prevent her Husband from having his courtesy. *Roberts v. Dirwell* (*l*).

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In the third Codicil, however, the Testator says: "I have bequeathed my Estate of *Cornwall* to my eldest Sister, Lady *Lushington*, and to her Children after her death." This makes her Tenant in Tail; for, wherever a Testator indicates an intention to give an Estate of Inheritance confined to a particular class of Heirs, as the issue of the body of the Devisee, the Courts have held that the Devisee takes an Estate Tail. *Hodges v. Middleton* (*m*), *Davie v. Stevens* (*n*).

The construction I am contending for is confirmed by the Codicil in which the Testator gives the Estates to the *Lord Chancellor* for the time being. For he directs that the profits of the Estates, after recompensing the person who shall reside on the Estates, shall be divided between his Sisters and their Children, thus showing that he understood that he had given an Interest in the Estate to the Children.

(*l*) 1 Atk. 606; see particularly 609.

(*m*) Doug. 415.

(*n*) Doug. 306.

The next question that relates to the Real Estate, is as to the Moiety of *Hordley*. As that was purchased after the date of the last Codicil, it descended to the two Sisters, in equal Moieties. The only other Real Estates are the Chambers in the *Albany*, and the 600 Acres of Waste Land. These, subject, as to the Chambers, to the Life Estate of Mr. *Thomas Stapleton*, vested in the Trustees under the residuary devise in the Will, but controlled by the first Codicil, which directs the Testator's Estates to be divided between his Sisters, in proportion to the number of their Children.

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Next, as to the Personal Estate. The first question is, whether the Stock on the Plantations is to be considered as Personal Estate, or as annexed to the Real Estates by virtue of the Will and Codicils. It has been said that a Devise of a Plantation will pass all the Stock and Effects on it; but it will no more pass them than a Devise of a Farm will pass all the Implements upon it. The word used by the Testator, in the second Codicil, when he devises the *Cornwall* and *Hordley* Plantations, is "Estate," and not "Plantation." The Argument, therefore, does not arise. The passage in the Will, too, by which he devises the Plantations to the Trustees, shows that he did not intend that, by the word "Plantations," the Stock and Effects should pass; for, if he had conceived that he had devised the Stock by the devise of the Plantation, he need not have added, as he did, the words "Mills," &c.

Then there is another question as to the Personal Estate, which is, whether or not the Stock and Implements on the Real Estate are to be considered as having passed under the Residuary Clause in the Codicil.

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Now the Residuary Clause in the Codicil is inconsistent with the same Clause in the Will. The former, therefore, must prevail; and the Stock on the Plantations passes by it. If that be so, the two Sisters were Joint Tenants of the Personality; and the whole now belongs to Lady *Lushington*. At least, the Personal Property must be divided between the Sisters according to the number of their Children; and they take their Shares absolutely, and not for their Lives only.

The Testator made the charge of 24,000*l.* his own Debt: and such of the Charges as are still subsisting must be borne by the two Estates in proportion to their values.

Mr. *Lovat* and Mr. *Preston*, for the Children of Sir *Henry* and Lady *Lushington* :—

The Will consists of two parts. In the first the Testator gives an Annuity to his Mother: the remainder is occupied by the disposition to his Sisters and their Children; and he takes anxious care that the Sisters should have their Shares for their separate use, and that they should have no power to alienate them. When the Testator says, in the Codicil, that it was his intention that the Estates he had bequeathed to his Sisters should be divided between them in the proportion of their Children at the time of his decease, he meant that they should nevertheless take the same interests in their Shares as he had given them by his Will. The reason which the Testator assigns for altering the disposition in his Will, does not require that the quantity of Estate, but only that the Shares should be different; and throughout these Instruments

the Testator appears to consider the Children as provided for. Then, in the next Codicil, he says: "This is in lieu of leaving the two Sisters both those Estates jointly." And, when he directs that, in every other respect, the conditions of the former Bequest are to be adhered to, the point is made still clearer; for, by "Conditions" he meant "Limitations," inasmuch as there is no Condition to be found in the Will. The Codicil of August 1816 puts the point beyond all doubt; for, as he says that he has bequeathed his Estate of *Cornwall* to his eldest Sister and to her Children after her death, he refers us to the Will to show what Interest they were to take. Besides, this Clause alone would make Lady *Lushington* Tenant for Life only of the Property. *Doe, on dem. of Davy, v. Burnsall* (o).

As to the Stock and other articles on the Plantations, it is clear, from the expressions used by the Testator, that he did not mean to separate them from the Plantations. He does not enumerate these articles as part of his Residuary Estate, but as distinct from it; and it would be most unreasonable to hold that he intended to separate them, as thereby the Plantations would have been rendered of little, if of any value. The Trust for the management and cultivation of the Plantations, removes all doubt upon this question. For it would be absurd to hold that the Testator intended the Stock, &c. to be sold and purchased again immediately afterwards. The Testator too directs his Personal Estate in *Great Britain* to be converted into Money, and that his Trustees shall convey, assure, and make over one

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full Moiety of his Plantations, Slaves, Cattle, Stock, and other Effects, upon or belonging to his said Plantations, &c. It is, therefore, beyond the possibility of doubt that the Testator intended that the things, which are here mentioned as belonging to the Estates in the *West Indies*, should be regarded as part of those Estates ; and consequently, that Lady *Lushington* takes an Estate, for her life only, in them. But it has been said that, in the Codicil, the Estates only are mentioned, and not the Stock, &c. But, in construing the Codicil, regard must be had to the expressions in the Will ; and then it will be clear, that, although the Testator spoke of the Plantations only, he meant, not only the Plantations, but the articles which he mentions in his Will as belonging to the Plantations.

The Testator's Assets are liable to pay off the Mortgage ; as he entered into an entirely new Contract, both as to the amount of the Sum secured, and the time of Payment ; and one part of the Debt is not distinguished from the other.

Mr. *Horne* and Mr. *Bickersteth*, for the Eldest Son of Colonel and Mrs. *Sheddon* :—

The Second Codicil revoked the Will, and gave Mrs. *Sheddon* the Fee in that Moiety of the *Hordley* Estate of which the Testator was seised when he made that Codicil. The reason the Testator assigns can not affect his devise. The direction that, in every other respect, the conditions of the former Bequest are to be adhered to, means merely that the other Devises and Bequests in the Will are to stand. The Testator, when he made the Codicil of August 1816, did not mean to make a new Devise, but to affix Conditions on the Per-

sons who were to take the Property under the preceding Codicil ; and he there treats the Property as already disposed of. If a Testator, in referring to his Will, mistakes the effect of it, he does not thereby revoke his Will. The Testator did not intend that his general Assets should be liable to discharge the Mortgages on the Plantations, except in the event of the *Cornwall* Estate proving insufficient for that purpose. This clearly appears from the language of the Deeds executed in the year 1817. The Testator merely intended to confirm the old Mortgage, and shows the greatest anxiety to guard his general Assets from those incumbrances, except in case the *Cornwall* Estate was insufficient to pay them ; but which is not the case. The 15,000*l.* was not to be a charge upon the Moiety of *Hordley*, of which the Testator was seised when he made his will, but on the other Moiety, in the event of his becoming the purchaser of it, and of its passing to Mrs. *Sheddon*. Now as that Moiety did not pass, the charge falls to the ground.

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Mr. *Pepys*, for Colonel *Sheddon* :—

It is the interest of Colonel *Sheddon* to contend that his Wife takes an Estate of Inheritance, for the purpose of establishing his claim to be Tenant by the Courtesy. In the Second Codicil, the Testator has used words which, standing by themselves, would present a Case upon which there would be no doubt, inasmuch as he has given the *Hordley* Estate to Mrs. *Sheddon* and her Heirs. The question then is this : whether there be enough on the face of the Instruments to control the clear legal meaning of the words which the Testator has used in the Second Codicil. Now, though there may be expressions the sense of which may be controlled by the intention

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Next, as to the Residue: as the Testator has said, in the first Codicil, that the disposition of his Property, except where he had expressly altered it, should stand good, it would be a gross violation of his intention to put a construction, on the Residuary Bequest in that Codicil, which would not only exclude the Children, but give the whole to the one Sister that might happen to be the survivor. His real meaning was, that, though the Real Estates were to be divided between the Sisters in proportion to the numbers of their Children, his Personal Property should be divided between them, equally. By "jointly" he meant "equally."

The next question is as to the 24,000*l.* Before the execution of the Deed of 1813 it is not disputed that the Estate charged with that Sum would have borne its own burden. If it had descended, the descent would have made no difference; for, as the Personal Estate had not been benefited, the Heir could not have had it exonerated; and the Deeds of 1817 leave the matter just where they found it. The original mortgage was kept alive; for the Estate was conveyed to the *Plummers*, subject to that mortgage. The Testator's Person and Property, except the Moiety of *Hordley* contracted to be purchased, are expressly exempted from all liability. There is no necessity, therefore, to resort to cases, as this exemption appears on the face of the instruments. The Devisee of the *Cornwall* Estate must take it as it is; and the Deeds of 1817 have no other effect than as a security. *Perkyns v. Bayntun* (p).

(p) 2 P. W. 664, n.

We now come to the last point, as to the 32,000*l.* As the Testator bought the Estate, and it did not pass by his Will, it is the usual case, and the Heir may compel the Money to be paid out of the Personal Estate. There is a contingent gift only, of the 15,000*l.*; to Lady *Lushington*; and the event upon which it was to take effect did not happen. For the Testator supposed that his Codicil would pass the whole of *Hordley*, if he should, at any future time, become the owner of the other Moiety; and it was under that impression, and on that condition, that he gave the 15,000*l.* to Lady *Lushington*.

Mr. Blenman and *Mr. Palk*, appeared for the Trustees, and other Parties.

Mr. Sugden, in reply:—

By the first Codicil, all the Estates given by the Will were to be divided between the Sisters in proportion to the number of their Children. By the second Codicil, he makes a different disposition as to *Cornwall* and the Moiety of *Hordley*, but leaves the Chambers and the Waste Land to be operated upon by the first Codicil; and they are therefore to be divided between the Sisters in the proportion before mentioned.

We now come to the Personal Estate. The words "my Estates," in the first Codicil, mean his Real Estates only, and not Personal Estate; for otherwise the appointment of the Sisters to be residuary Legatees would have nothing to operate upon. The obvious and natural meaning of the word "Estate," is Real Estate, and the Testator afterwards uses it in that sense.

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The next question is, what do the Sisters take as Residuary Legatees; which involves the question as to the Cattle and Stock on the Plantations. The Court can not, in point of Law, say that they are not to be Residuary Legatees of all the Personal Estate of every description. I apprehend, therefore, that the Stock and Chattels must pass under the Residuary Bequest in the first Codicil. It is convenient that, by the gift of a Farm, the Stock and Utensils should pass; but the Court has never so decided.

Then what is the meaning of: "I leave my two Sisters, jointly, my Residuary Legatees." Without the word "jointly," no one could argue in this Court that the Sisters would not be Joint-tenants. Can then the introduction of that word make any difference? What does "jointly" mean: not "separately" or "severally." There is no hardship in Survivorship, as the Legatees might sever the joint-tenancy immediately. The Court has no authority to say that these words should not have the effect which the Law gives them.

The VICE-CHANCELLOR:—

The Bill, in this case, is filed by Dame *Fanny Maria Lushington*, who is the Sister and one of the Co-heirs of *Mathew Gregory Lewis*, a gentleman of great celebrity in this country, against the Devisees and Trustees of the Will, her own Husband as having an adverse interest, and her own Children, and likewise against Mr. *Sheddon*, who was the surviving Husband of the other Sister and Co-heir of the Testator, and against her children who were likewise interested. This suit is no otherwise adverse than as it has been found absolutely necessary to take the opinion of the Court on the rights of the Parties arising under the Will and

Codicils, and they have raised very difficult questions as to their contents, especially as those contents are explained by reference to the nature and quality of the Estates which pass by them. It is necessary, in order to make intelligible these testamentary dispositions, to state that the Testator, at his death, was seised of an Estate in the Island of Jamaica, called the *Cornwall* Estate. That Estate was furnished, as estates in that country, to make them of any value, must be, with a supply and population of Slaves, which, in that country, are Real Estate, and likewise with cattle and other live stock, and likewise with Plantation implements. The stock and implements are mere Personal Chattels, but of a peculiar description. The Testator, at the same time, was seised of another Estate, called *Hordley*, with other Persons as Tenants in Common, which was equally supplied and furnished with Slaves, Cattle, Implements, and Utensils. That Estate was held, as I have already stated, by himself and others, as Tenants in Common, as were the Chattels and moveable Implements. He, at the time of making his Will and up to the time of his death, was unmarried, and his Sisters were his presumptive Co-heirs at Law. It is evident, from the whole context of these Testamentary Instruments, that his Sisters and their Children were the objects of his affection and bounty; and we are left to collect the rights and interests of different Parties to the same Property, by inferences and expressions of the Testator himself; and we must look to see what are the expressions of regard and affection to the objects of his bounty, whom he refers to as taking his Property. It appears, from the context of these Instruments, that his intention was to give to each of his Sisters a Moiety of his Estate, and to limit that Moiety as

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transmissible to the Children of each Sister in equal Shares, securing, to the separate use of each Sister, the like enjoyment, protecting it from the Husband and limiting the Estate to each of their Children. The Will, in this respect, is perfectly clear; and no doubt could have arisen had he been content with that. He was, besides these Plantations, entitled to a large tract of Land in the same Island, which was stated to be waste and unproductive; but which might be made valuable by cultivation. He had likewise a considerable Personal Estate, and also a small Real Estate, which was specifically devised for Life, consisting of Chambers in the *Albany*. A Moiety of the Estate called *Hordley* he appears to have contemplated to purchase, which he did not hold himself: and some observations will arise on that part of his intention as expressed in his Will, not with a view of giving effect to the Will as to affect the passing of that Estate, but to give a construction to his intention as to other parts of his will. This being the state of his Property, and his Debts being very large, though he declares them to be very trifling, not that he mistook the state of his affairs, but he considered the peculiar class of Debt as hardly to be considered as Debt, he made his Will, which was dated in June 1812. By that Will he gives his Mother a rent charge of 1,000*l.* a Year for her Life. Subject to that, he devises: "All his Plantations, or Sugar Works, Penns, Lands, Slaves, Tenements and Hereditaments in the Island of *Jamaica* with their members and appurtenances." It is material to observe the language of the Devise of this Property; as the Will appears to have been prepared by a Person who was perfectly competent and conversant with the nature of the Property he was giving; for one of the attesting Witnesses to the Will was a

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Mr. Richard Grant, who was eminently skilled in the Law of that Island, and well acquainted with the nature of the Property. He gives, after the Annuity: "All my Plantations, Sugar Works, Penns, Lands, Slaves and Hereditaments, and all my Right Title and Interest therein or thereto, and all the Cattle, Mules, live and dead Stock, Plantations, Utensils and Implements of Planting and Husbandry, and all other Property and Effects upon or belonging to the Plantations or Sugar Works, Penns, and Lands, and all the rest, residue and remainder of my Estate real personal or mixed, in possession, remainder, reversion, expectancy or otherwise howsoever in Law or Equity, or over which I have any power of appointment," to Trustees for the after-mentioned purposes. The specialty with which the Plantations, Stock, Utensils and Implements, Cattle, &c. connected with the Devise of the Plantations, are mentioned, show that the gentleman who prepared the Will knew that a gift of the Land denuded of its concomitants, was a gift of a burthen and not of a benefit. It is likewise not unimportant to remark that the Trustees were directed to manage and cultivate and improve all his Plantations or Sugar Works, Lands, &c. in *Jamaica*, to the best advantage, and for that purpose, from time to time to repair and keep up all the Works and Buildings upon the Plantations, and erect new Works or Buildings when necessary, and also to purchase and supply the Plantations with such Slaves, Cattle, Stock, and other things, as might be necessary for the supporting and improving the same. Now it is material to observe this part of the Will, where the Testator has deliberately devised the Estates, in order to collect his intention, when we come to consider the informal and untechnical mode of

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expression in which he afterwards devises a portion of his Estate; and I would ask, whether it is possible, regard being had to the nature and quality of the Estate in question, that he intended, by that untechnical form of expression, to pass an Estate less beneficially accompanied than by the Will. He then proceeds, after directing his Trustees to convert all his Personal Estate, in *Great Britain*, which should not consist of Money, into Money, and to lay it out on trust, to give one Moiety to his Sister, the Plaintiff, Lady *Lushington*, for her life, for her separate use, and after her death to her Children, with benefit of Survivorship between them, with Remainder over, in case of failure of her Children, to his Sister, Mrs. *Sheddon*, who also has a Moiety devised to her in the same way, with corresponding Limitations over for the benefit of her Children, with Limitations to her Sister, which need not be stated, as no question arises on them. Then comes that series of Codicils which create the difficulty. The Testator, in a Codicil to his Will, says: "There will probably be found a Will made many years ago, as also another Will made since my Father's death. If any thing contained in this Codicil should be contradictory to any part of these two Wills, it is my injunction that the preference should be given to this Codicil, and to the second Will before the first. In other respects the instructions contained in those Wills, as to the disposition of my Property, are to stand good." Now I think it must be admitted that this passage excludes all possibility of presumptive revocation. Wherever he has made a disposition inconsistent with the disposition here made, he has directed that that inconsistent disposition shall prevail over the disposition made in the Will. Wherever he has not done so, it is clear that

these dispositions must stand good as his testamentary intentions. There is introduced, by way of interlineation, a Line, dated the 16th of January 1813, which says: "It has been destroyed since writing the following;" that is, the Will that he speaks of as being probable to be found; therefore the only testamentary disposition to be found would be that which was made since his Father's death, which he intended to prevail, except in so far as the subsequent Instrument is to be considered as inconsistent with it. He then proceeds: "I possess, besides my two Estates in *Jamaica*, some Thousand Pounds still in the hands of my Father's Executors, probably Six or Seven Thousand Pounds." Having stated that, as a ground for considering that there will be more than sufficient to pay his Debts and Legacies, he gives certain specific Bequests, which need not be adverted to, as no question arises about them. He then proceeds: "As I leave no Debts, or very trifling ones," (although at the time he owed on mortgage about 40,000*l.*.) "I presume that there will be ready Money enough to discharge all these Legacies, which I desire to be paid with the greatest possible dispatch. But, if there should not be ready Money in hand, I then direct that the Deficiency shall be supplied by annually setting aside half of the Profits of my Estates in *Jamaica* till the whole Sum shall have been discharged, till when the Legacies are to be discharged proportionally." This shows an intention that the Estates should pass, not charged with the Debts and Legacies, to the Sisters for life, and their Issue. Then he goes on making a Devise inconsistent with that anterior Devise. He says: "It is my intention that my Estates, which I have bequeathed to my two Sisters, should not be divided equally between them, but in

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proportion to the number of their Children at the time of my decease. I leave my two Sisters, jointly, my residuary Legatees." Upon this Codicil, which here terminates, it has been contended that the Estates were to be apportioned, in value, according to the number of the Children of the Sisters, one of them having a greater number of Children than the other. And this last line : " I leave my two Sisters, jointly, my residuary Legatees," has been argued upon, and fairly argued upon, as evidence that he intended to revoke that disposition to his Sisters, in moieties, as Tenants in Common, and also to revoke the benefits given to the Children ; and that this line is to constitute a general residuary Devise and Bequest of all his Estate to both his Sisters as Joint-tenants. Looking at the whole context of the Will, and what I shall subsequently state, I think it is quite clear that no such intention was ever contemplated by him. I collect, from this Codicil, thus : that, with respect to his Plantations, contradistinguished from his other Property that passed under the residuary Bequest, he intended they should be divided between his Sisters, not equally, but in the ratio of the number of Children which each had ; and that, as to the Property which passed under the residuary Bequest, his two Sisters should be his residuary Legatees in the same ratio. Then he seems, at a subsequent period, to have done, for the purpose of explaining himself, and to prevent Disputes, that which has created the Disputes he meant to avoid. He goes on : " To prevent disputes, I leave to my eldest Sister, Lady Lushington, and her Heirs, my Estate of Cornwall, in *Jamaica* ; and, to my youngest Sister, Mrs. John Sheldon, and her Heirs, I leave my Property in the Estate of *Hordley*, in *Jamaica* ; the number of

their respective Children nearly equalizing the value of the two Properties : this is in lieu of leaving the two Sisters both those Estates jointly." Now it cannot be doubted that he does not use the word "jointly" here in its technical sense, creating a joint Estate subject to Survivorship ; but, instead of leaving to each of his two Sisters the Estate, the number of the Children of one Sister being greater than the number of the Children of the other, induces him to vary the disposition, and, as the value of the *Cornwall* Estate is as much beyond the value of *Hordley*, as the number of the Children of one Sister exceeds the number of the Children of the other, he leaves to his Sister, Lady *Lushington*, his Estate of *Cornwall*, and to Mrs. *Sheddon* his Estate of *Hordley*. I think it is as little to be doubted, on this part of the Case, (though it was strenuously argued that this Devise gave the Fee-simple to the two Sisters in all the Estates, leaving nothing to the Children,) that the Testator did not mean to extend the quantity of Estate in his Sisters, or that, where he used the word "Heirs," he used it attributable to the Sisters, and not to those who would take by way of Limitation. I have no doubt, notwithstanding the Argument, that the Codicils do not revoke the substantial and intrinsic Limitations of the Will to the Sisters in the moieties of the Plantations. I am likewise of opinion, and shall so declare, that the Testator, by the expression "residuary Legatees jointly," meant no otherwise than, instead of creating an inequality of division as to the residuary Personal Estate, and which the antecedent part creates in the Real Estate, that his residuary Estate should be divided between his Sisters and their Children, equally in point of quantity, though not as a joint Estate.

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Then comes the last Codicil; which, at present, I shall use for no other purpose than to fortify the construction that I divine from the obscure Codicils with reference to any revocation of these Limitations of the Estates which were given to the Sisters—that he could not have meant that one Sister should, in the event of a Survivorship, take the whole, or that the Sisters should take absolutely in exclusion of their Children. It is to be observed that, throughout the Codicil, he confines himself to Regulations calculated to preserve the happiness and comfort of the Slaves, who are to a certain extent under the control, and objects of the protection and bounty of the Owners. He provides that the Sisters, or those who are to take under the Limitations of his Will, should, from time to time, reside on the Estate, for the purpose of securing the comfort and protection of his Slaves. He says: "I have bequeathed my Estate of *Cornwall* to my eldest Sister, and to her Children after her death." That is a repetition of the Devise in the first Codicil. If he could have intended to revoke the Devise to the Sisters and their Children, this would be strong enough to restore the original Devise, and leave the Children just where the Will put them. In this situation he died. It appears that the Testator had miscalculated, not only the nature and condition of his Property, but the value. He considered that Lady *Lushington*, having a greater number of Children than Mrs. *Sheddon* had, would be better provided for by taking, exclusively to herself and Children, the *Cornwall* Estate, and that the other Sister, who was less burdened with Children, would be sufficiently provided for by taking the *Hordley* Estate. On looking at the result of the *Master's Report*, it appears that, by fortuitous circumstances, the *Cornwall* Estate

has been totally unproductive, and the *Hordley* Estate greatly productive.

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Then the question arises as to the way in which the Estates are to be burdened with the Testator's Debts. One question is, out of what Fund the Annuity of 1,000*l.* a-year, which is given to the Testator's Mother, but which subsisted for a very short time after his death, is to be paid, those who have administered the Estate having received, and mixed into one mass, all the Produce, and having made all the Payments out of that one mass. I am very clear that that Annuity must be paid out of the general Personal Estate, as far as it is competent to pay it; and next, that the Real Estates, devised to his Sisters, must contribute, if necessary, the remainder: and I apprehend that those Estates must contribute according to their relative values. How that relative value is to be settled, is one of the most difficult questions I have met with. Because a *West India* Estate will, in some years, be enormously profitable, and, in other years, instead of producing a Profit will incur a Debt in its cultivation. When, therefore, one looks at the particular nature of a *West India* Estate, one does not know how to deal with the question: and I never met with an instance where it has been directly decided.

Then the question is, how are the Debts to be paid. And here is a new, serious question of equitable administration to be decided, having regard to the transactions of the Testator and those who preceded him, with respect to the charges which at his death encumbered these Estates. His Father, at the time of his death, left a Mortgage Debt upon the Estate; and it

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appears that the Testator derived the Moiety of the Estate, which the Father died seised of, from the Gift of the Father. It appears that the Testator made an Assignment of this Mortgage to Mr. *Miles*; and it was transferred from one House to another, as suited the convenience of the Parties, but always augmenting the Debt, and taking on himself to connect his own Debt with that Debt which had fallen upon him by transmission from his Ancestor. Sometime before his death, he made a Contract to Purchase the outstanding Moiety of the *Hordley* Estate; and it appears, by an expression in his Will, that he had that Purchase in contemplation; but that declaration cannot be taken into consideration with a view to give any title to the Moiety which was afterwards purchased, but it must be considered as having descended to the Sisters.

But a question arises upon the transactions respecting the Mortgage Debts; and, looking at the effect of the Instruments by which the Testator secured the Debt contracted by his Ancestors and the Debt which he contracted himself, I think that, notwithstanding the doctrine found in *Ancaster v. Mayer*⁽¹⁾, the Testator must be considered as having adopted the whole Debt as his own distinct debt; and that there is no Equity for separating the whole Debt, so as to throw any part of it on the Estate which originally descended from his Father charged with the Debt. The whole, therefore, must be considered as his Debt, subject to be paid by the two Estates, after applying the Personal Estate, and the other undisposed of Estates; and that it must be paid by the two Estates, *Cornwall* and *Hordley*, reasonably, and according to their relative value: any thing that falls upon the Inheritance of these Estates must be

(1) 1 *Brow C* 454

so paid. I am aware that there is a peculiarity in the Security, which raised a very fair Argument; I mean the peculiar way in which the Testator has guarded himself, or any part of his Property, against Payment of this Debt during his Life: but this circumstance does not prove that the Testator did not intend to adopt the whole Debt, because he makes no distinction, in that respect, between the Debt that he himself contracted, and which therefore was unquestionably his own, and the Debt which had been contracted by his Ancestor.

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The next question arises on that part of the Codicil ¹⁸²⁸ in which the Testator devises the two Estates. He merely mentions his *Cornwall* Estate and his *Hordley* Estate, not adding "Cattle, Stock, Implements and Utensils," and it is insisted, therefore, that, under this latter Devise, the Devisees are to take merely realty, and that which is Personality is to be considered as undisposed of, or as constituting part of his general Personal Estate. On the part of Mr. *Sheddon* it was argued that it went to the Sisters, as residuary legatees, and consequently, he was entitled to a Moiety, as representing his deceased Wife.

I have before stated that I do not know of any Decision that the Court has come to upon the question; what is to pass under the Devise of a *West India* Estate. It was reasoned, here, that it would no more pass anything beyond the Land, than if it were the Devise of a Farm in *England*, by the Owner who cultivated it, as a Farmer as well as Owner; because, with it, would not be meant to pass the Cattle or Stock, or any thing

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more than the mere Land of that Farm. But there is no analogy between the two species of Property ; and I should have great difficulty in deciding that, if a Man gave his *West India* Plantation called *A.* to a Devisee, the gift of that Plantation, as a Plantation, was to be confined to the mere realty : for, denuded of those accompaniments which would make it productive, such an Estate is rather a burthen than a benefit. But, however, I am of opinion that that Case does not, at present, call for any Decision on my part. I am of opinion that the Testator intended to give, by this Codicil, under the denomination of these Estates, all those things that are given, by the Will, as constituent and component parts of these Estates ; and that he did not mean to lessen the Bequest, though he meant to divide the subject, instead of leaving it as a Tenancy in Common.

BULLOCK v. EDINGTON.

1827.
23d June.Practice.
Demurrer.

IN this Suit, a Demurrer was filed on the 9th of April. On the 12th of that Month, the Registrar's Office was closed for the *Easter* Holidays, and was not re-opened until the 24th. On the 25th, the Demurrer was entered with the Registrar. In the interval, no process to compel an Answer had issued.

Upon a Motion made by Mr. *Wilbraham* and opposed by Mr. *Treslove* and Mr. *Roupell*, the question was, whether the Demurrer, in this Case, was filed in due time, in compliance with an Order of the Court, which requires that every Demurrer shall be entered with the Registrar within Eight Days after it has been filed (a), and *Jordan v. Sawkins* (b), and *Dyson v. Benson* (c), were cited against the Motion.

The VICE-CHANCELLOR:—

My Idea clearly is, that the Eight Days mean Eight *office* Days; the Demurrer therefore was entered in due time.

(a) See *Beam*, Ord. 77. (b) 3 Bro. C. C. 372.
(c) *Coop.* 110.

The eight Days within which a Demurrer must be entered with the Registrar, are eight *Office* Days.

45. Sess. 147.
1 M. & K. 453.
— contra
5 Sess. 565.

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27th June.

Will.
Construction.
Usurious Debt.

—
A Testator directed that one of his residuary Legatees should be answerable for all Debts due to him from the Father of the Legatee. A debt, though usurious, must be deducted from the Legatee's share.

19th May. 265

STANTON v. KNIGHT.

THOMAS KNIGHT, deceased, by his Will, made a specific Bequest to *William Wills* the younger, and also gave him a Share of his Residuary Estate, and declared it to be his Will, that whatever Sums or Sum of Money (if any) Principal as well as Interest, should be owing to him from *William Wills* the elder, upon Bond or otherwise, at the time of the Testator's Death, the Property thereby bequeathed to his Son, *William Wills*, the younger, should be liable to and answerable for the whole amount of such Sum or Sums as should or might be then due and owing to the Testator from *William Wills* the elder.

A Suit having been instituted for the administration of the Testator's Estate, the *Master*, in computing the Debts which were due from *Wills* the elder to the Estate, had taken into account a Bond Debt upon which, by Agreement between the Testator and *Wills* the elder, usurious interest had been paid, although, on the face of the Bond, it appeared that Interest at five per cent. only was to be paid. *Wills* the younger excepted to the *Master's Report*.

Mr. *Wakefield*, in support of the Exception, said that the Testator did not intend that a Debt that could not be enforced, should be deducted from the younger *Wills*'s share of the residue: that the Testator had in his contemplation legal debts only, and meant the Son to run the risk of his Father's solvency, and not of the illegality of the Debt.

Mr. Horne, Mr. Pepys, Mr. Duckworth, and Mr. Teed, for the other Residuary Legatees and the Executors, admitted that the Debt could not be recovered at Law, but said that they had nothing to do with the Usury of the Transaction; that the Question was, merely, what was the Testator's Intention, and whether the Debt was not one which the Testator considered to be due; and that he had, in direct Terms, alluded to the Security, in his Will.

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The VICE-CHANCELLOR:—

A Debt, though usuriously contracted, is, nevertheless, a Debt. The Statutes against Usury preclude the remedy merely; and, when a Party comes into this court to be relieved against Usury, the Court refuses its assistance, unless the Plaintiff will consent to pay what is really due. The Bond is, on the face of it, a legal one; and the Testator never contemplated any objection being made to it on the ground of Usury.

Exception over-ruled.

EVITT v. PRICE.

29th June.

THE Plaintiffs were Attorneys, and had for several years employed the Defendant as an Accountant, and intrusted him with the Affairs and Secrets, and allowed him free access to the Books and Papers of the Co-partnership and their Clients. The Defendant having, as the Bill alleged, got into his possession, in the course of his being so employed, several of such Books and Papers, and made extracts therefrom, and a dispute having arisen, between him and the Plaintiffs, as to the

Injunction.

Injunction granted to restrain the disclosure of Secrets come to the Defendant's knowledge in the course of a confidential Employment,

29th June.

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amount of his demands upon them, wrote a Letter to them saying that he considered himself absolved from all obligation to confidence, and at liberty to make public what he might deem necessary, and that he would not sit down *minus*, with the knowledge he possessed. Upon which the Bill was filed, praying that the Defendant might be decreed to deliver up the Plaintiffs all the before-mentioned Books, Documents, and Extracts then in his custody or power, and be restrained from taking and retaining any Copies of, or Extracts from the last-mentioned Particulars; and from communicating the said Particulars, or the Contents thereof, or any of the Information therein contained, to any Person or Persons whatever; and from communicating any of the Information possessed or acquired by him relating to the said Co-partnership, or the Affairs or Secrets thereof, or the Clients thereof, by means of his having been so employed as aforesaid.

Mr. *Sugden* and Mr. *Wakefield* now moved, *ex parte*, for an Injunction in terms of the Prayer, and referred to *Cholmondeley v. Clinton* (a) as an Authority for granting the Motion as to the Secrets of the Firm and their Clients.

The VICE-CHANCELLOR granted the Injunction accordingly.

(a) 19 Ves. 261. S. C. Coop. 80.

HOLT *v.* MURRAY.1827.
3d July.*Foreign
Attachment.
Judgment-debt.*

THE Plaintiff proceeded against *Hamilton* and one *Murray*, as Garnishee, in the *Lord Mayor's Court*, for a Debt of 570*l.* due from the former, and, on the 22d of July 1816, obtained Judgment against *Murray* as such Garnishee. Seven days afterwards, *Murray* died. On the 3d of November 1817, the Plaintiff filed a Creditor's Bill, against the Executors of the Deceased, alleging that the deceased was indebted to him in 570*l.* with an arrear of Interest, under the Judgment so obtained. The usual decree having been made, the Master inserted this Debt in the Schedule of simple contract Debts, and did not compute Interest upon it. Upon this the Plaintiff excepted to the Report, averring that the Master ought to have included the Debt in the first Schedule to his Report, and to have computed Interest upon it, from the 22d of July 1816, to the date of his Report, inasmuch as the Plaintiff was a Judgment Creditor of the Testator.

A Judgment in the *Lord Mayor's Court*, obtained against the Garnishee, does not entitle the Plaintiff to rank as a Judgment Creditor in the administration of the Garnishee's Assets.

The record of the Judgment in the *Mayor's Court* (which was much observed upon in the argument) was as follows :—

“ Before the Mayor and Aldermen in the Chamber of the *Guildhall* of the City of *London*.

“ *Richard Holt*, by *William Windale* his Attorney, demands, against *Robert Hamilton*, 1,000*l.* of lawful Money, &c. which he owes to and unjustly detains from the said Plaintiff. For that whereas the said Defendant,

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on the 10th day of April, in the fifty-sixth year, &c. at the Parish of *Saint Helen, London*, for and in consideration of divers sums of Money before that time due and owing from the said Defendant to the said Plaintiff, in the Parish aforesaid, and then being in arrear and unpaid, granted and agreed to pay, to the said Plaintiff, the said sum of 1,000*l.* above demanded, where and when he the said Defendant should be thereunto afterwards required. Yet, notwithstanding, the said Defendant, although often thereto requested, has not yet paid to the said Plaintiff the said sum of 1,000*l.* above demanded, or any part thereof, to the damage of the said Plaintiff, 20*s.*; and, therefore, he brings his suit, &c. sworn 570*l.* and upwards: pledges to prosecute, &c.

“ 11 April 1816.

“ And the said Plaintiff, by his said Attorney, prays process according to the custom, &c. and it is granted, &c. and thereupon, it is commanded, by the Court, to *Thomas Newsom*, one of the Serjeants at Mace of the said Court, that he, according to the custom of the said City, summon, by good summoners, the said Defendant to appear here in this Court, to answer the said Plaintiff in the plea aforesaid, and that he return and certify what, &c. and, afterwards, (to wit) at the same Court, the said Serjeant at Mace returned and certified to the said Court, according to the custom, &c. that the said Defendant had nothing within the said City or the Liberties thereof, whereby he can be summoned, nor was to be found within the same. And, at the same Court, the said Defendant was solemnly called and did not appear, but made default: and now, at this same Court, it is alleged, by the said Plaintiff, by his said Attorney, that *Thomas Garland Murray, Esq.*

the Garnishee, owes to the said *Robert Hamilton*, the Defendant, 570*l.* in Monies numbered, as the proper Monies of the said Defendant, and now has and detains the same in his hands and custody, and, therefore, the said Plaintiff, by his said Attorney, prays process, according to the custom, &c. to attach the said Defendant by the said 570*l.* so being in the hands of the said Garnishee as aforesaid, so that the said Defendant may appear in this Court here to be holden, &c. to answer the said Plaintiff in the plea aforesaid: Whereupon it is commanded, by the Court, to the said Serjeant at Mace, that he, according to the custom, &c. attach the said Defendant by the said 570*l.* so being in the hands and custody of the said Garnishee as aforesaid, and the same in his hands defend and keep, so that the said Defendant may appear in this Court, here to holden, &c. to answer the said Plaintiff in the plea aforesaid; and that the said Serjeant at Mace return, &c. And, afterwards, (to wit) at a Court holden, &c. on Monday the 22d day of April aforesaid, the said Plaintiff, by his said Attorney, appears, and the said Serjeant at Mace returned and certified to the same Court, that he, by virtue of the said precept, on the said 11th day of April, between the hours of three and four in the afternoon, had attached the said Defendant by the said 570*l.* so being in the hands and custody of the said Garnishee, and the same defended, &c. according to the custom, &c. so that the said Defendant might appear at this Court, to answer the said Plaintiff in the plea aforesaid: and thereupon the said Defendant, at the same Court, was solemnly called and did not appear, but made a first default, which said first default at the same Court is recorded according to the custom, &c. [The record then stated

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three other days being successively given to the Defendant to appear, on each of which he made default.] And thereupon after the said four defaults, recorded by the Court against the said Defendant in the plea aforesaid, according to the custom, &c. the said Plaintiff, by his said Attorney, prays process according to the custom, &c. to warn the said Garnishee to be and appear in this Court to show cause, &c. ; whereupon at the same Court holden, &c. it is commanded, by the same Court, to the said Serjeant at Mace, that he, according to the custom of the City, warn and make known to the said Garnishee to be and appear here in this court to be holden, &c. on Saturday the 27th day of April aforesaid, to show cause, &c. why the said Plaintiff ought not to have execution of the said 570*l.* so attached in hands and custody as aforesaid : And that the said Serjeant at Mace return and certify, at the same court, what, &c. The same day is given, by the Court, to the said Plaintiff to be there, &c., at which said court, holden, &c. the said Plaintiff by his said Attorney appear : and the said Serjeant at Mace hath returned and certified, to the same Court, that he, by virtue of the said precept to him directed and according to the custom, &c. had warned and made known to the said Garnishee to be and appear at this same court to show cause, &c. as above commanded, and thereupon, at the same court, the said Garnishee was solemnly called and appeared, and appointed in his stead *William Jones*, his Attorney, and hath leave to imparl until, &c.

“ PLEA.—And the said *Thomas Garland Murray*, by *William Jones*, his Attorney, on the 30th day of April, in the Year of the Reign aforesaid, comes and says that the said Plaintiff ought not to have Execution of the

said 570*l.* in Monies numbered, so attached as aforesaid, or any Part thereof, because he says that, at the making the attachment aforesaid, he had not owed to or detained, or yet hath, owes to or detains from the said *Robert Hamilton*, the Defendant named in the Bill original and attachment aforesaid, the said 570*l.* or any part thereof, in manner and form as the said Plaintiff hath above supposed, and of this he puts himself upon the Country, and the said Plaintiff doth the like, Therefore, &c.

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“Verdict for the Plaintiff 570*l.*—Afterwards, to wit, on Tuesday, the 9th day of July, in the 56th year, &c. the Jurors of the Jury aforesaid being solemnly called, twelve of them, that is to say, *Samuel Colson*, &c. (here follow the names of the other Jurors,) appeared, who being elected, tried and sworn upon the said Jury, according to the custom of the said City, to declare the truth of and concerning the Premises, and to try the issue joined between the said Parties in the Plea aforesaid, for their Verdict, upon their Oath, say that, at the time of making the said attachment aforesaid, the said *Thomas Garland Murray* owed to and detained from the said *Robert Hamilton*, the Defendant named in the Bill original and attachment aforesaid, the Sum of 570*l.* in Monies numbered, as the proper Monies of the said Defendant in manner and form as the said Plaintiff by his Bill original and attachment aforesaid hath supposed. Therefore it is considered by the Court that the aforesaid Plaintiff have Execution of the said 570*l.* in Monies numbered, so found by the Jury as aforesaid, by Pledges, &c. if the Defendant, &c. and Process for the Remainder, &c.”

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Mr. Rose, and Mr. Bolland, in support of the Exceptions.

A Judgment recovered in the Lord Mayor's Court, is entitled to the same priority as a Judgment recovered in any of the superior Courts (a). The only question is, whether the nature of this Judgment is such as entitles it to be so classed, it being a Judgment against the Garnishee and not against the Defendant. There can be no doubt that a Judgment in the Mayor's Court against the Defendant, would entitle the Debt to rank as a Judgment Debt. *Holt* brought an Action against *Hamilton*. *Hamilton* being in contempt, *Holt* issued an Attachment against *Murray*. *Murray* pleaded the only Plea which a Garnishee can plead, namely, *nil habet*; and Judgment was had against him upon proof that he had Money of the Defendant's in his hands. It appears, from the wording of this Judgment, that it does not differ from Judgments of another description. Upon the Cause being tried and Execution issued, the Goods and Person of the Garnishee may be taken, in the same manner as under an Execution issued by any of the superior Courts. Both Executions, therefore, stand upon the same grounds, and give the same advantages. If the Defendant, after the Money has been taken out of the hands of the Garnishee, chooses to purge his contempt, within a year and a day, by *scire facias*, he may do it; and the Money will then be restored to the Garnishee, or, if Execution is not gone, the Attachment is dissolved. That was not done in this case. The Judgment is final; and the operation of it is such as to put into the pocket of the Plaintiff

(a) *Swinb.* 7th edit. 827, note.



the Money which he has obtained in the Court below. In *Bulmer v. Marshall* (*b*), (which will be relied on for the Defendants,) it was found that there were no assets within the City of *London* upon which the writ could operate; and, therefore, application was made to the Court of King's Bench for the Plaintiff to have Execution in *Middlesex*, under 19 *Geo. 3.*, c. 70. That Statute enables the Court, when it is satisfied that there are not Goods within the jurisdiction of the inferior Court to satisfy the Execution, to give the Plaintiff a larger range to get the benefit of his Judgment; and the question was, whether the proceeding by Attachment, being by Custom, came within the statute. The Court thought that it would be going too far to extend the jurisdiction in the case before them, as it did not come within the words of the Statute; but never alluded to the Judgment not giving the Plaintiff all the rights which the Judgment of a superior Court would have given him. *Bulmer v. Marshall*, therefore, is no decision upon the present question. It decides only that, as the Execution was obtained under a Custom, it was not one which the Courts of *Westminster Hall* could assist. There is no ground for saying that a Judgment Debt, although not within the 19 *G. 3.*, c. 70, is not entitled to the same priority as other Judgment Debts are. If it had been found that the Garnishee had Goods in *London*, they might have been taken in Execution. It is no prejudice to the rights of the Plaintiff, to range this Debt, before the *Master*, in the higher class of Debts. The Judgments of all Courts of Record are entitled to the same rank as Judgments of the superior Courts. *Searle v. Lane* (*c*).

(*b*) 5 *B. & A.* 821.

(*c*) 2 *Vern.* 88.

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Mr. *Pepys* and Mr. *Pemberton*, for the Defendant :—

Whatever rule may be laid down in the Books that have been cited, it does not apply to this Case ; as this Debt can not be entitled to rank as a Judgment Debt in the administration of the Assets of this Testator. He owed these Parties no Debt. The error of the *Master* is different from that complained of. He ought not to have allowed it as any Debt at all. The proceedings in the Mayor's Court show the nature of the demand. The object of the proceeding against *Murray*, was not to enforce Payment of the Debt, but to compel the Defendant, by impounding his Money, to submit to the Jurisdiction of the Court. The Verdict does not give a Right to the Money. It makes no Contract between the Plaintiff and the Garnishee. A Year and a Day are given to the Defendant to come in and submit to the Jurisdiction ; and, if the Defendant does come in within that time, he must give the Garnishee sureties to return the Money. In no respect, therefore, is the Execution issued for satisfaction of the Debt. *Bulmer v. Marshall* establishes that the Court of King's Bench refused the aid given by the Act. And why did that Court refuse to interfere ? Because it did not consider the Judgment to be a judgment of an inferior court, but merely a proceeding, for the recovery of a Debt, between *Holt* and *Hamilton*, not between *Holt* and *Murray*. If it had been a Judgment for the Recovery of a Debt, it would have fallen within the words of the Act. *Wetter v. Rucker* (d) establishes that the Judgment does not constitute a demand between the Plaintiff and the Garnishee. The Garnishee is not discharged

(d) 1 Brod. & Bing. 491.

from liability to his Creditor, unless the Money is paid over under the Execution. It would be absurd, therefore, to hold that the Judgment creates a Debt between the Plaintiff and the Garnishee, but does not discharge the liability of the latter to the Defendant. Here *Holt* has got nothing but Judgment. He has not proceeded to Execution, by which alone the Money is given, and the Garnishee discharged. No proceeding can be taken upon this Judgment against Property out of the Jurisdiction of the Court; therefore there can be no proceeding against the general Assets of the Deceased. Consequently this demand can not be entitled to rank as a Judgment Debt against those Assets.

Mr. *Rose*, in reply.

In *Macdaniel v. Hughes* (e), it was decided that the Garnishee, against whom a Recovery was had, might avail himself of the proceedings in the Mayor's Court, in an Action brought against him to recover the Debt. Long before the Answer was put in in this Suit, the proceedings were completed in the Court below, and the time, allowed to *Hamilton* to come in and submit to the Jurisdiction, had expired. The Courts have always paid respect to the Records of other Courts, however inferior they might be, and recognized the priority of the Debt recovered in them. The Judgment here is final. The Decision in *Bulmer v. Marshall* was not founded upon the ground that the Judgment was not final. That Case decides, that the 19 *Geo. 3. c. 70*, intended to give assistance to Courts of limited Jurisdiction, but not in Cases of foreign attachment.

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v.
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The VICE-CHANCELLOR:—

It is quite inconsistent with the principles of the Administration of Estates, to consider this as a Judgment Debt. As at present advised, I think that this Plaintiff does not stand in the rank of a Judgment Creditor: but, as it is a question at Law, I shall not refuse him a Case, if he chooses to take one; but it must be at the peril of paying Costs. *Wetter v. Rucker*, from the best consideration I have been able to give it, appears to be precisely in point.

The Plaintiff declined to take a Case for the opinion of a Court of Law, and the exception was over-ruled.

4th July.

Practice.
Restoring Bill.

Bill restored, though the order to dismiss was not obtained till after a considerable interval since the last proceeding in the Cause, and though the Plaintiff had acquiesced in the order; the Suit being one in which the main object was answered when an Injunction was obtained.

BARFIELD v. NICHOLSON.

THE nature and objects of this Suit, and the proceedings in it, prior to those after mentioned, will be seen on referring to 2 *Sim. & Stu.* 1.

Nicholson's Answer was filed on 3d March 1824, and *Kelly's* further Answer, on the 31st January 1824. On the 29th of November in that year, *Nicholson* filed a Bill against *Barfield* to have the Assignment of his Copyright in the Architectural Dictionary delivered up to be cancelled, as having been fraudulently obtained, and for relief consequential thereon. No proceedings having been taken in the former Suit within the time limited by the rules of the Court, the Defendants, *Nicholson* and *Kelly*, on the 19th of May 1827, obtained Orders for dismissing the Bill, as of course. *Barfield* now moved to discharge those Orders.

In support of the Motion, two Affidavits were filed by *Barfield*, and Mr. *Wilks* his Solicitor, the former stating the object of the original Suit, the proceedings therein, and the prayer of *Nicholson's* Bill: that the latter Suit was still in prosecution, and was in the nature of a Cross Bill, relating to the matters substantially at issue between the Parties in the former Suit: that, in 1825, Mr. *C. Barber*, the Deponent's former Solicitor, died, and, after his death, the Papers in both Causes were handed over to the Deponent's present Solicitor; but, as the Deponent understood that his object in instituting the first Suit had been substantially accomplished by the granting of the Injunction, and that the real question at issue would be discussed and determined by the proceedings in the second Suit, and being desirous while the Injunction continued in force, to abstain from all proceedings against the Defendants that could be avoided, and which would create double expense, he instructed his present Solicitor to take no proceedings for the immediate prosecution of the original Suit: that, without any Motion to dissolve the Injunction, or any application to speed the Cause, orders of dismissal had been obtained in the original Suit: that the dismissal of the original Suit would dissolve the Injunction, and prejudice the important Interests of the Deponent, and therefore, he was advised that it was necessary to prosecute the original Suit for the continuance of the Injunction and the other purposes thereof: that his Interest required protection in the same manner as when the Bill was filed and the Injunction granted: and that, if that Bill were to stand dismissed, the Deponent must renew the Suit, which would produce additional litigation and serious expense to all Parties.

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v.
NICHOLSON.

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NICHOLSON.

Mr. *Wilks*'s Affidavit stated that, when the Papers were delivered to him, he questioned *Barfield* as to the proceedings that had been taken and were required to be adopted, on his behalf, in those Suits: that *Barfield* thereupon informed the Deponent that it was his desire that no further steps should be taken in the Suit wherein he was Plaintiff, while an Injunction obtained therein continued in force, as he had been advised, by his deceased Solicitor, that that Injunction had really effected all the objects sought to be obtained, and that the question at issue in the second Suit was substantially the same as in the first Suit, and that, therefore, no further steps should be taken in the first Suit.

It appeared, by the Affidavits made in opposition to the Motion, that the Taxation of the Costs, under the orders of dismissal, had been proceeded in by the Solicitors of both Parties, and was nearly completed.

Mr. *Heald*, Mr. *Sugden*, and Mr. *Roots* appeared in support of the Motion, and relied on the facts stated in the Affidavits on their side.

Mr. *Wakefield* opposed the motion, and urged the delay that had taken place in the first Suit, and the acquiescence in the orders of dismissal, by *Barfield*'s Solicitor proceeding with the Taxation of the Costs: and, to show that the existence of the Injunction did not affect the regularity of the orders, he cited *Day v. Snee* (a), and *Hannam v. The South London Water-works Company* (b).

(a) 3 V. & B. 170.

(b) 2 Mer. 61.

The VICE-CHANCELLOR:—

In cases of Invasion of Patent or Copyright, where the substantial object of the Suit is obtained when an Injunction is granted, the Plaintiff's Solicitor acts judiciously towards his Client, and mercifully towards the Defendant, in abstaining from prosecuting the Suit. I think, therefore, that for that reason, and considering all the circumstances of this Case, and notwithstanding the acquiescence in the Orders, this Bill ought to be restored.

Motion granted.

1827.

BARFIELD
v.
NICHOLSON.

MITCHELL v. KNOTT.

17th July.

Demurrer.
Equity.

THE Plaintiffs were the Assignees of *John Cullen Knott*, a Bankrupt. The Defendant, *Knott*, was the Father of the Bankrupt: and the other Defendant was the then late Sheriff of *Kent*. In September 1822, *J. C. Knott* gave his Father a Warrant of Attorney, to secure Monies which the Father had advanced and made himself liable to, on the Son's account. In September 1826, Judgment was entered up upon the Warrant of Attorney, and a *Fieri Fasias* issued, under which the Sheriff proceeded to sell the Son's Goods and Stock in Trade, by retail. The Son, having been arrested by two of his other Creditors, rendered himself, in discharge of his Bail, in January 1827. On the 12th of February, the Sheriff began to sell the remainder of the Goods and Stock in Trade by Auction. The Sale lasted eleven days. On the 23d of that month, the Commission issued.

6134 C. 479

A Bill in
Equity does not
lie by the As-
signees of a
Bankrupt
against a Judg-
ment Creditor
and the Sheriff,
for monies le-
vied under an
Execution upon
a Judgment by
Nil dicit.

1821.

MITCHELL
v.
KNOTT.

The Plaintiffs alleged, by their Bill, that the Judgment having been obtained by Confession or *Nil dicit*, the Father was not entitled to have the benefit of his Execution against the general Creditors of the Son, and that the Plaintiffs, as his Assignees, were entitled to receive the Monies in the hands of the Sheriff, arising by the Sale, for distribution among the Creditors under the Commission; and that the Father was entitled only to be paid rateably with the other Creditors (a). The Bill prayed for a declaration to the effect of this allegation; for an account (if necessary) of the Monies received by the Sheriff, and of what was due to the Father at the Son's Bankruptcy; and for Injunctions to restrain the Father from proceeding in the Execution, and the Sheriff from paying over the proceeds of the Sale to the Father. To this Bill, the Father put in a general Demurrer.

Mr. Knight, in support of the Demurrer, was beginning to open the Pleadings; when the Vice-Chancellor desired to hear the Counsel in Support of the Bill.

(a) By 6 Geo. 4, c. 16, s. 108, it is enacted, "That no creditor having security for his debt, or having made any attachment in London, or any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the bankruptcy: provided that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors."

Mr. Horne and Mr. Whitmarsh, for the Plaintiffs :—

A Suit in Equity is the proper mode of obtaining the relief sought for. The Bill proceeds upon the ground of preventing multiplicity of Suits. The case of *Taylor v. Taylor* (b), shows that the Judges were of opinion that, in a case like the present, there was no remedy at Law. Besides, *Knott*, the Father, laid by, and took no step to enforce his Security for four years. The Accounts prayed against the Sheriff, and *Knott*, the Father, are necessary, but could not be taken at Law. If we had brought Trover against the Sheriff, we could not have got the Money ; because the Act does not declare the Execution void.

1827.

MITCHELL
v.
KNOTT.

The VICE-CHANCELLOR :—

The late Bankrupt Act was intended to facilitate the administration of Bankrupts' Estates, not to vary the rights of the Creditors and Assignees under particular circumstances. When the Act declares that the Fund shall be distributable, it means that the Assignees shall recover and distribute it. The case of *Taylor v. Taylor* decides the very reverse of what it is cited for, namely, that the Assignees have a remedy, either by Petition or Action, to possess themselves of the Property to be distributed. Whenever an Act gives a Right, it means to give a legal remedy, and not to put the Party to the extraordinary remedy of a Court of Equity.

on 19th Augt 1823

(b) 5 B & C. 392.

1827.
18th July.

Practice.
Amendment.

A Bill may
be amended by
adding Plaintiffs,
notwith-
standing the De-
fendants have
answered it.

HICHENS v. CONGREVE.

THE Bill was filed by some of the Shareholders in a Mining Company, on behalf of themselves and others, complaining of a fraudulent misapplication, by the Directors, of part of the Funds of the Company, and seeking to have the amount refunded. After two of the Defendants had put in their answers, the Bill was amended by adding Plaintiffs.

Mr. *Heald*, Mr. *Twiss* and Mr. *Loftus Lowndes* now moved, on behalf of the Defendants who had answered the Bill, that the amended Bill might be taken off the file, or the amendments be struck out. They said that Defendants might be prejudiced by the adding of Plaintiffs after they had answered the Bill; inasmuch as they might have been able to defeat the original Plaintiffs, and under that impression, might have made admissions which they would not have made if the additional parties had been Plaintiffs originally, or might have qualified those admissions: that *A.* and *B.* might not be entitled to the relief sought, but *A.* *B.* and *C.* might: that, in this case, the new parties did not stand in the same situation as the old ones did, for the former were original Shareholders, whereas the latter were merely Purchasers from original Shareholders, and the Defendants might, therefore, be entrapped into not shaping their Defence so as to meet the Case set up by the new Plaintiffs.

Mr. *Horne*, Mr. *Sugden*, and Mr. *Pemberton*, appeared against the Motion.

The VICE-CHANCELLOR:—

It has been urged, in support of the Motion, that, if these amendments are allowed to remain, injustice may be done to the Defendants, because they may have admitted facts which they would have accompanied with explanation if the Record had stood originally as it now does. But no injury can, from that state of circumstances, fall upon the Defendants; for, after a Bill is amended, a Defendant has an opportunity of adding the explanatory circumstances in his answer to the Amendments.

1827.

HICKENS
v.
CONGREVE.

Motion refused, with Costs.

CADDICK v. MASSON.

18th July.

Practice.
Dismissal.

Where there are two Plaintiffs, and one of them only becomes Bankrupt, the Bill may be dismissed upon the usual Motion.

THERE were two Plaintiffs in this Cause. After replication, one of them became Bankrupt. No proceedings having been had in the Cause for three Terms, the Defendant obtained the usual order to dismiss the Bill for want of prosecution. Mr. Piggott, for the Bankrupt Plaintiff, now moved to discharge that Order for irregularity. He said that, when a Plaintiff becomes Bankrupt, the suit can not be dismissed upon the usual motion; but that a special application must be made that the Assignees may file a Supplemental Bill within a certain time, or that the Bill may be dismissed: and he cited *Randall v. Mumford* (a), *Porter v. Cox* (b), *Adamson v. Hall* (c), and *Sharp v. Hullett* (d).

(a) 18 Ves. 424. (c) Turn. 258.

(b) 5 Madd. 80. (d) 2 Sim. & Stu. 496.

1827.

CADDICK
v.
MASSON.

Mr. Jacob, for the Defendant, said that the bankruptcy of a Plaintiff was not an abatement of the suit, but only made it defective as to parties: that a defect of that nature did not prevent the suit being dismissed: that here there were two Plaintiffs, one of whom was solvent, and that he might make the suit complete if he pleased.

The VICE-CHANCELLOR:—

The rule laid down in the cases referred to, is confined to the case of a sole Plaintiff, who, becoming bankrupt, is supposed to be negligent of what is sought by the Bill; and the Court, to prevent surprise and save expense, requires notice to be given to the Assignees. There is no instance where the Court has taken upon itself to interpose the Rule, where there are two Plaintiffs one of whom is solvent and the other insolvent; for it is as competent to the solvent Plaintiff, as it is to the Assignees, to rectify the suit.

Motion refused without Costs.

On the 19th of July, a motion similar to that in the last Case, was made by Mr. Wakefield in *Latham v. Kenrick*, and opposed by Mr. Matthews: and was also refused by the Vice-Chancellor.

Pilmanster v. Pratt. Decr. 5. 1842

I moved a similar motion on the part of Mr. Pratt that the Bill might be dismissed for want of prosecution. Application had been filed & a date to appear served & the Order for a Commission served when Mr. Pratt became Bankrupt.

Mr. Olderton opposed the motion but Sir James L. C. granted it.

LORD v. LORD.

1827.
19th July.

THE decree directed the Real Estates of a Testatrix to be sold for payment of Legacies given to the Plaintiffs. Two of the lots were purchased by Sir *Thomas Turton* *Vendor and Purchaser*. *Practice. Sale under Decree.*

She, however, had consulted him upon the management of her Property, and had frequently expressed a desire to purchase those parts of the Testatrix's Estate which were contiguous to her own Property, if they should ever be sold. He afterwards went to her house for the purpose of informing her of the purchase, but found her in such a state of mind as to be incapable of understanding matters of business; and consequently did not make any communication to her upon the subject. Mrs. *Buckner* continued in the same state until her death, which took place on the 24th of September 1826. On the 6th of December following, the *Master* reported Mrs. *Buckner* to be the purchaser of the two lots; and, on the 8th of that month, the report was, on a motion made by *Eleonora Lord*, one of the Defendants, confirmed *nisi*. On the 15th of January 1827 *Eleonora Lord* moved, before Sir *John Leach*, V. C. to confirm the report absolutely; but his Honor, having been told that Mrs. *Buckner* was dead, refused the motion. A motion was now made, by the same party, either that the Co-heirs and Executors of Mrs. *Buckner* or some or one of them, or Sir *Thomas Turton*, might be considered as the purchasers of the lots, and be ordered to pay the Purchase-money for the same, and that the Order *nisi* might be discharged, or that those lots might be resold.

*A. purchased for B., but without authority, an Estate sold under a Decree. B. died without adopting the Purchase. The Order *nisi* was nevertheless obtained. The Court refused to order B.'s Executors to pay the Purchase money; and, on the Heir declining the Purchase, discharged the Order *nisi*, and directed a Resale.*

If the Executors of a Purchaser under a Decree refuse to pay the Purchase-money, they cannot be compelled to pay it, unless a Suit be instituted by the Heir.

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Mr. *Shadwell*, and Mr. *Stuart* appeared in support of the motion. And Mr. *Sidebottom*, for *Henry Lord*, one of the Defendants.

Mr. *Whitmarsh*, for the Plaintiffs, said that it appeared, by the Affidavits, that Sir *Thomas Turton* had no instructions to make the purchase, and that Mrs. *Buckner* never adopted it; and that, therefore, he purchased on his own responsibility.

Mr. *Treslove*, for Mrs. *Buckner's* Co-heirs, contended that all the proceedings, down to the Order *nisi*, were regular: that *Eleonora Lord* ought to have proceeded to confirm the report absolutely, by a motion of course, and had no right to discharge the Order *nisi*: that the Co-heirs were entitled to the lots, and that the Executors, on being served with notice, were bound to pay the Purchase-money.

The *Vice-Chancellor*: Suppose the Executors were not to admit assets?

Mr. *Treslove*: The Court would, nevertheless, order the report to be confirmed.

The *Vice-Chancellor*: I do not think that I should make such an Order.

Mr. *Treslove*: This contract can not be the subject of a Bill, as it was entered into with the Court. Sales before a *Master* are not within the Statute of Frauds; because the contract is made with the Court, and not with an individual.

THE VICE-CHANCELLOR:—

The Court can not act upon a person who is not a party on the Record, unless he has come in and done some act which subjects him to the jurisdiction of the Court.

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The Co-heirs are entitled to purchase these lots if they choose, and have an Equity to compel the Executors to reimburse them, if they have assets. But if the Co-heirs do not choose to complete the purchase, let the Order *nisi* be discharged, and the *Master* proceed to a resale; and reserve the consideration as to any deficiency that may arise on the resale, and by whom the Costs of it are to be repaid.

Mr. *Treslove* having declined the purchase on behalf of the Co-heirs, the Order for a resale was made in the terms before mentioned.

JACKSON v. PARISH.

19th July and
12th Aug.Practice.
Supplemental
Answer.

THE Bill was filed, in February 1826, by *Mary*, the Widow of *James Jackson*, to have dower assigned to her out of certain Messuages, which had been conveyed to the Defendant by *Edward Rider*, who derived title thereto through Conveyances made by *James Jackson*. The Defendant, in his Answer, which was filed in May 1826, admitted that he intended to dispute the Plaintiff's Title to Dower; and that the Title Deeds of the Estate were in his possession; and he set forth a List of them in a Schedule; but the Schedule did not contain any notice of the Fine after mentioned. After the Answer had been replied to, and Witnesses examined

Leave given, after replication, to file a Supplemental Answer to a Bill for Dower, in order to state a Fine and Non-claim which had been omitted, through ignorance, in the original Answer.

M M 4

2 *Term* 565.
Hall v Painter 4 *Simp.* 474

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for the Plaintiff, the Defendant moved for liberty to file a Supplemental Answer, for the purpose of stating and putting in issue, a Fine with Proclamations levied, by *Edward Rider* and *Ann* his Wife, to the Defendant, in Michaelmas Term, 60th *Geo. 3.* of the Messuages in question, and of insisting upon the benefit of the Fine and the Non-claim thereon; and that, if necessary, the Replication might be withdrawn, or taken as a Replication also to the Supplemental Answer; the Defendant submitting, in either case, that it should be without prejudice to the Depositions already filed on behalf of the Plaintiff, or to her filing further Depositions, if she should be so advised.

The Defendant, in an Affidavit in support of the Motion, deposed that he had in the second Schedule to his Answer set forth a full and true List of all the Title Deeds, Muniments, Papers and Writings, relative to the Messuages, Tenements and Premises, which then or ever were in his possession, custody or power, and which were delivered to him upon the occasion of his purchase of the said Premises, and that the same did not contain any Chirograph, or Indentures of Fine levied by *Edward Rider* and *Ann* his Wife, of whom he purchased the Premises, nor had he any such delivered to him at the time of his Purchase, nor was he aware of the same, or that any such ought to have been delivered to him, or of the nature or effect thereof upon the Plaintiff's Claim.

The Defendant's Solicitor also made an Affidavit, in which he deposed that he was not professionally employed by the Defendant upon the occasion of his purchase of the Messuages or Dwelling-houses in question

in the Cause, and had no knowledge of the Defendant's Title thereto until he was instructed to prepare the Answer of the Defendant: and that, upon that occasion, he applied to the Defendant for the Title Deeds in his possession relating thereto, and received from him an Abstract of the Title, together with the two Bonds set forth in the second Schedule to the Defendant's Answer; but that the several other Deeds, Papers and Writings mentioned in the said Schedule, were not delivered to him, nor seen by him, until after the Answer was prepared, when the Dates of the Deeds, and the Names of the Parties thereto, were added to the Schedule: That the Answer of the Defendant was prepared from the said Abstract, in which no notice was taken of the Fine in question; and that he had not, at the time of filing the Answer, any knowledge or belief that such a Fine had been levied; and that he was wholly ignorant of the fact of such Fine having been levied, until on or about the 21st of April 1827, when he accidentally discovered the same; that, in consequence of his ignorance of the said Fine having been levied, the same and the benefit thereof was omitted to be insisted upon in the Answer of the Defendant, or to be pleaded in bar to the Claim of the Plaintiff.

Mr. *Pepys* and Mr. *Knight* appeared in support of the Motion:—

They cited *Patterson v. Slaughter* (a), and *Barrington v. O'Brien* (b).

Mr. *Shadwell* and Mr. *Swanson* opposed the motion. If a Party applies for leave to put in a Supplemental Answer, he must show, not only that the Facts came

(a) *Amb.* 292. (b) *2. Ball & Beatt.* 140.

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to his knowledge after the first Answer was filed, but that he could not, by any diligence, have discovered them; or, the Allegation which he wishes to add, must be against his Interest. The effect of allowing the additional fact to be stated in this Case, would completely alter the Plaintiff's Rights: for, as the Record now stands, she is clearly entitled to relief. After publication has passed, a Plaintiff cannot file a Bill of Review, neither can he file a Supplemental Answer. *Curling v. Marquis Townshend* (c); *Livesey v. Wilson* (d); *Edwards v. M'Leay* (e); *Const v. Barr* (f); *Bingham v. Dawson* (g); and Lord Bacon's rule as stated in *Patterson v. Slaughter* (h).

Mr. Pepys, in reply:—

There is no similarity between giving leave to file a Bill of Review, and to file a Supplemental Answer. A Supplemental Answer is merely to put a new fact in issue: the object of filing a Bill of Review is to mend a Case by new Evidence, and, for that reason, such a Bill can not be filed after publication. *Patterson v. Slaughter* most nearly resembles this Case; and there Lord Hardwicke granted the Permission. Here there is no danger of perjury. In *Const v. Barr* the Defendant had admitted the Plaintiff's Title. In *Livesey v. Wilson*, the Party, having admitted a Fact, desired to qualify it. These Cases are wholly beside the present Question. We are desirous only to put in issue a new Fact, which, if proved, will be a legal bar to the Plaintiff's Claim; and, if leave be refused us, the Plaintiff will get our property.

(c) 19 Ves. 628.

(f) 2 Mer. 57.

(d) 1 V. & B. 149.

(g) Jacob's Rep. 243.

(e) 2 V. & B. 256.

(h) Amb. 292.

The VICE-CHANCELLOR:—

The Question is, whether a Defendant who has omitted, in consequence of the neglect of his Solicitor, to put a good Defence upon the Record, is to be allowed the benefit of it, by filing a Supplemental Answer. I will look into the Cases that have been cited before I finally dispose of this Motion. But I am quite sure that, before publication had passed, it would have been competent to the Defendant to file a Bill, stating that he was a Purchaser for valuable consideration, and that a Fine had been levied to him more than five years ago ; and, that upon a Bill for Dower having been filed against him, under an elder Title, he laid all his Papers before his Solicitor to make a Defence, and that the Solicitor omitted to set up the Fine and Non-claim, and to pray that he might be at liberty to put the Fine and Non-claim in issue.

The VICE-CHANCELLOR:—In this Case, I think the Defendant must have liberty to put in a Supplemental Answer, but the Replication must stand as a Replication to the Supplemental Answer, and without prejudice to the Depositions taken : and the Plaintiff is to be at liberty to go into any proofs to controvert the Facts of Non-claim, without amending the Bill to put those Facts in issue. The Defendant must also pay the Costs of this Application, and caused by and incident to the putting in such Supplemental Answer.

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12th August.

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19th July.

Practice.
Injunction.

Motion to extend the common Injunction, granted, where the Answer, which was filed on the same morning, was insufficient, and the Trial was coming on the next day but one.

Thompson v. Bayliss
1. June 15
Jefferson v. George.
1. June. 49

MUNNINGS v. ADAMSON.

MOTION to extend the Common Injunction to stay a Trial that was coming on, on the next day but one. The Answer was filed on the morning of the day on which the Motion was made.

The *Vice-Chancellor* said that, as the Motion was made too late, he would not grant it, unless the Answer was insufficient.

His *Honor*, having read the Answer, said that it was insufficient, and made the Order.

Mr. *Horne* and Mr. *Lynch* moved; Mr. *Teed* opposed, and cited *Whitehouse v. Hickman* (a).

(a) 1 Sim. & Stu. 102.

20th July.

DANDO v. DANDO.

Practice.
Residue.

If an Executor admits that all the Testator's Debts, &c. have been paid, the Court will, on Motion, order the income of a Balance, paid in by the Executor, to be paid to the Person entitled to the Residue.

Hewett v. S. 2. Hare 154
Digby v. Bayliss 4 Hare 444.
Wtly v. Jefferson. 11. Hare. 27.

Mr. *Koe*, for the Plaintiff, now moved that the Dividends then accrued due, and thereafter to accrue due, on the Stock purchased with the Balance, might be paid to her.

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THE VICE-CHANCELLOR:—

If an Executor admits Assets, he does it at his peril; and, therefore, I shall make the Order as prayed.

HANDLEY v. BILLINGE.

UPON an Inquiry directed by the Decree, a Witness had been Examined before the Examiner.

20th July.

Practice.
Depositions.

Mr. *Barber*, for some of the Defendants, now moved that the Depositions of this Witness might be forthwith published. He produced a Certificate, signed by Mr. *Baines*, Mr. *Jackson*, and Mr. *Mills*, three of the Clerks in Court, to the following effect:

Practice as to
publishing De-
positions of
Witnesses ex-
amined after
Decree.

“ We humbly certify that, in the case of the Examination of Witnesses after a Decree, such Witnesses having been examined either by Commission, or before the Examiner, the publication of the Depositions is passed by Order of the Court, unless the publication be passed by the respective Clerks in Court signing a consent to pass publication, in the Six Clerks Rule-book. But, in the Examination of the Witness by the Master personally, a circumstance rarely occurring, the Publication is by Warrant granted by the Master.”

The Vice-Chancellor ordered the Depositions to be published accordingly.

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whether such Estate was subject to any and what Intail, and when and by whom created, and to what Estates, and upon what Trusts the same Estate was limited, and who was or were entitled thereto, and to what Estate or Estates: and that the *Master* should inquire whether the Estate, stated in the Answer of the Defendant, *Thomas Burrows*, to have been agreed to be purchased by him, was a proper Estate in which to invest part of the residue of the Testator's Estate according to the intention of the Testator, as expressed in his Will: and it was also ordered that the *Master* should inquire who was the Person intended, by the Testator, by the description of *Arnold Burrows*, Son of Colonel *Thomas Burrows*, of *Hill-street*.

The *Master* reported that, by Indentures of Lease and Release, dated the 2d and 3d of October 1807, being the Settlement on the marriage of the Defendant, *Thomas Burrows*, with *Susan Seward*, *Robert Burrows* (who was the Father of the Defendant, *Thomas Burrows*, but who died in the Testator's lifetime) and the Defendant, *Thomas Burrows*, conveyed certain Lands, &c. which the *Master* afterwards reported that the Testator meant by the description of his *Stradone* Estate, to the use of *Robert Burrows*, in Fee, until the marriage, and, after the marriage (subject to two Trust Terms of 300 years and 350 years, and to three Rent-charges of 500*l.*, one for the benefit of *Thomas Burrows* during the Lives of *Robert* and *Thomas Burrows*, and the two others for the Jointures of *Susan Seward* and *Sophia*, the Wife of *Robert Burrows*) to the use of *Robert Burrows*, and his Assigns, for life, without impeachment of Waste, with Remainder to Trustees to preserve Contingent Remainders, with Remainder to the

use of *Thomas Burrows* and his Assigns, for life, without impeachment of Waste, with Remainder to the same Trustees to preserve Contingent Remainders, with Remainder to the use of the first Son of *Thomas Burrows*, in Tail Male, with Remainders to the second, third, fourth, and every other Son of *Thomas Burrows*, successively, in Tail Male, with Remainder to the Daughters of the marriage, as Tenants in Common in Tail, with Cross Remainders between or amongst them in Tail, and, in case there should be but one such Daughter, with remainder to such only Daughter in Tail, with Remainder to *Robert Burrows* in fee. The Trusts of the term of 300 years were to raise 5,000*l.* of which 1,500*l.* were to be applied for the Portions of the younger Children of *Robert Burrows* and *Sophia* his Wife, and the remainder towards payment of certain Debts of *Robert Burrows*, and the Surplus (if any) was to be paid to *Robert Burrows*. The term of 350 years was created for securing the three Rent-charges of 500*l.*, and, after the decease of *Thomas Burrows*, to raise 2,400*l.* for the Portions of the younger Children of the marriage. And Powers were given to *Thomas Burrows* to jointure an after-taken Wife to the amount of 300*l.*, and for *Robert Burrows* and *Thomas Burrows* to charge the Estates with 3,000*l.* each, and for *Robert Burrows*, during his life, and, after his decease, for *Thomas Burrows*, to grant Leases of the Estates, for lives, or thirty-one years.

The *Master* found that the Estates at *Stradone* were subject to the entail created by the Settlement, and were limited to such uses, and upon such Trusts, and subject to such Powers, Provisoes, Limitations and Agreements as were therein mentioned; and that *Thomas Burrows* was entitled thereto, as Tenant for Life, by

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, A. R.¹

virtue of the Settlement, with Remainder to his first and other Sons in Tail Male, with Remainder to his Daughters, as Tenants in Common in Tail, with Cross Remainders between them in Tail, with the ultimate Remainder to Thomas Burrows in fee.

And the *Master* also found that the Estate, stated in the Answer of the Defendant *Thomas Burrows* to have been agreed to be purchased by him, was a proper Estate in which to invest part of the Residue of the Testator's Estate, according to the intention of the Testator as expressed in his Will. And he found that the Defendant *A. R. Burrows* was the Person intended by the Testator, by the description of *Arnold Burrows*, Son of Col^{onel} *Thomas Burrows*, of *Hill-street*.

Thomas Burrows, having afterwards made another Purchase, and the *Master* having approved of it, it was referred to the *Master*, by the Decree on further Directions, to settle a proper Settlement of the Estates, already purchased and thereafter to be purchased, with the Testator's Residuary Estate, upon the Uses and Trusts, and according to the Directions expressed and declared concerning the same in and by the said Will and Codicil. And the Court declared that the Defendant *A. R. Burrows* was the Person intended by the Testator by the description of *A. Burrows*, Son of Colonel *T. Burrows*, of *Hill-street*.

Two Drafts of a Settlement having been brought in before the *Master*, one on the part of the Defendant *Thomas Burrows*, and the other on the part of the Defendant *Arnold Robinson Burrows*, the *Master* rejected the former, and made certain alterations and additions

to the latter, and certified to the Court that he had approved of the last-mentioned Draft, with such alterations, as a proper Draft of Settlement of the Estates already purchased and thereafter to be purchased.

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By that Settlement, those Estates were limited to the Defendant *Thomas Burrows* for Life, without impeachment of Waste, with Remainder to Trustees to preserve Contingent Remainders, with Remainder to *Robert Burrows*, the Son of *Thomas Burrows*, (who was born in the Testator's life-time,) for Life, without impeachment of Waste, with Remainders to Trustees to preserve, &c., with Remainders to the Sons of that *Robert Burrows*, successively, in Tail Male, with Remainder to *James Edward Burrows*, (another Son of the Defendant *Robert Burrows* (a), who had been recently born,) in Tail Male, with Remainders to every other Son of the Defendant *Robert Burrows*, successively, in Tail Male, with Remainder to *Arnold Robinson Burrows*, for Life, with Remainder to Trustees to preserve, &c., with Remainder to the Sons of *A. R. Burrows*, successively, in Tail Male, with Remainder to *William Nesbit Burrows*, Son of the said Colonel *Thomas Burrows*, for Life, without impeachment of Waste, with Remainder to Trustees, &c., with Remainders to the first and other Sons of *William Nesbit Burrows*, successively, in Tail Male, with Remainder to the Heirs Male of the Body of * *Burrows*, Grandfather of *Arnold Robinson Burrows*, with Remainder to the Heirs Male of the Body of * *Burrows*, Great Grandfather of *A. R. Burrows*, with

(a) It did not appear, from the papers with which the Reporter was furnished, that this Son was made a party to the Suit.

* Blanks were left for these names in the draft.

CASES IN CHANCERY.

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Remainder to *A. R. Burrows*, in fee. And the Settlement contained a power to the Defendant *Thomas Burrows*, during his Life, and, after his decease, for the person entitled to the first Estate of Freehold or Inheritance, to lease the Premises either for three Lives or for thirty-one Years.

To this Report Exceptions were filed on behalf of the Defendants *Thomas Burrows* and *Robert Burrows*, his Son, and also on behalf of *Arnold Robinson Burrows*. The Exceptions taken by the Defendant *A. R. Burrows*, were that the *Master* had not inserted any Clause for limiting the Estates, purchased and to be purchased, to him, in the event of *Thomas Burrows* disposing of the *Stradone* Estate from his Male line: Whereas the Draft Settlement ought to have contained a Clause for limiting the Estates to him and his Heirs, or the Heirs of his Body, or to him for Life, with Remainder to his first and other Sons in Tail Male, in the event of *Thomas Burrows* concurring in any act whereby the Entail of the *Stradone* Estates, in the Male Line, might be barred: and that an Estate for Life only was limited to the Exceptant: whereas the Estates ought to have been limited to him in Fee-simple, or otherwise in Tail Male; or, if an Estate for Life, with Remainder to his first and other Sons, ought to have been limited to him, by the Settlement, then the immediate Remainder in Fee, on failure of his Issue Male, ought to have been limited to him.

The Exceptions taken by the Defendants *Thomas Burrows* and *Robert Burrows*, were that the *Master* had not limited the Estates to be purchased according to the Testator's intention; it having been the Testator's declared intention that the Estates to be purchased and

settled should be added and closely entailed to the *Stradone* Estate, which was the Family Estate: and that the *Master* had certified that he had rejected a Draft of a Settlement brought in before him by the Defendant *Thomas Burrows*: whereas the *Master* ought not to have rejected the said Draft, but ought to have adopted and approved the limitations therein proposed of the Estates to be settled according to the Will and Codicil of the Testator: and that the *Master* had, by the Draft of the Settlement which he had approved, limited, to the Defendant, *Robert Burrows*, the eldest Son of the Defendant *Thomas Burrows*, an Estate for Life only, with Remainder to his first and other Sons in Tail Male: whereas the *Master* ought to have given an Estate in Tail General, or in Tail Male, to the Defendant *Robert Burrows*, and not an Estate for Life only: and that the *Master* had, in failure of Issue Male of the Defendant *Thomas Burrows*, wholly excluded the Daughters of the said Defendant from any succession to the Estates: whereas the *Master* ought not to have approved of a Draft of any Settlement by which the Daughters of the Defendant *Thomas Burrows* were excluded; but he ought, on failure of Issue Male of the Defendant *Thomas Burrows*, to have limited the Estates to the Daughters, as Tenants in Common in Tail, with Cross Remainders between or amongst them; and ought to have limited the ultimate Reversion or Remainder in Fee of the Estates, after the limitation to the Issue Male and Female of the Defendant *Thomas Burrows*, to the Defendant *Thomas Burrows*, as the Heir at Law.

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Mr. Sugden, and Mr. Pemberton, for *Arnold Robinson Burrows* :—

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The question is: what is the true construction of the Will and Codicil. The Estate referred to by the Testator was settled in strict Settlement; but it certainly was limited to the Daughters as Tenants in Common in Tail. It cannot be denied that, in the Will, there was no exclusion of any Issue of *Thomas Burrows*. But the Codicil puts an end to all doubt upon the subject; for it is quite clear that the Testator could not mean a *Female* head to the Family; and the Estate was to go over if *Thomas Burrows* died without Male Issue: and, when an Estate is directed to go over in default of Male Issue, the Issue Female can not take. The Male Line alone can be included in the Limitations. A Son of a Daughter can not be included, because, if he is to take, his Mother must take before him, which she could not do, as the Estate was to go over only on the extinction of Male Issue.

The next direction in the Codicil is: "Should *Thomas Burrows* die without having Male Issue, or dispose of *Stradone* out of the Family Line, it is my desire that the Residue of my Fortune should go to *A. Burrows*, Son of Colonel *Thomas Burrows*, of *Hill-street*, or to his nearest relative in the Male Line." The *Master* has rejected every word of this Direction. It is true that a Tenant in Tail can not be prevented from suffering a Recovery: but an Estate may be settled so as to shift on his doing any act to prevent the Estate going in the line in which it is settled. The *Master* should have given effect to this Direction, by inserting a Clause for shifting the Estate.

The next question is, whether *Robert Burrows* should have an Estate Tail, or for Life only. Now the Testator

directs the Estate to be closely entailed. *Robert* was born in the Testator's life-time. He might, therefore, have been made Tenant for Life, with Remainder to his first and other Sons in Tail. *Humberston v. Humberston* (b) is an authority for this Limitation.

The only other Exception relates to the ultimate Limitation in Fee. The Testator directs that, when the Estate goes over, the Residue of his Fortune should go to *Arnold Burrows*, or his (that is *Arnold Burrows's*) nearest relative in the Male Line. That passes the Reversion in Fee. It is clear that it must remain in *Arnold Burrows*, or his nearest Relative in the Male Line. We contend, therefore, that the *Master* ought to have given him a Remainder in Fee, expectant upon the failure of his Issue Male.

Mr. Pepys, and Mr. R. Roupell, for the Son of *Thomas Burrows*, who was born after the Testator's death, contended that the Clause of Forfeiture was nugatory, as it was intended to guard against what could not happen, as *Thomas Burrows* could not dispose of the *Stradone* Estate, and therefore that Clause was not to be extended to an act of a Son of *Thomas Burrows*.

Mr. Horne, and Mr. Roupell, for *Thomas* and *Robert Burrows* :—

The Estate to be purchased is to be a kind of accessory to the *Stradone* Estate. There is to be no separation between them. The new Estate must have precisely the same Limitations as the old one, or else it will not

(b) 1 P. W. 332, last edition, where the Cases are collected down to the present time.

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be an addition to that Estate. Upon this point the Will is clear. Is any alteration in this respect made by the Codicil? That Instrument contains no devise, nor any new course of Limitation, but was made under an erroneous impression that *Thomas Burrows* (who was Tenant for Life of the *Stradone* Estate) was Tenant in Tail of it. This is evident, by the Testator supposing that *Thomas Burrows* could dispose of the *Stradone* Estate. If he has mistaken the Limitations of that Estate, it does not alter the general purpose expressed in the Will. The Codicil is so inaccurate that the Court cannot act upon it. The only safe course is to take the Settlement of the *Stradone* Estate as a guide. If an Estate for Life in the new Estate is to be given to *Robert Burrows*, the two Estates may be separated; as *Thomas Burrows*, being Tenant in Tail of the *Stradone* Estate, may bar the entail of it.

Mr. Rose, and Mr. Knapp, for *Robert* and *Honora Burrows*, two of the Children of *Thomas Burrows*:-

Under the Settlement of the *Stradone* Estate, *Robert Burrows* is the first Tenant in Tail, and must take a similar Estate under the true construction of the Will. Under that Clause which relates to *Thomas Burrows*, or his lawful Heir, the whole Inheritance would vest in him. But this Clause is qualified by the direction that the new Estate is to be added and closely entailed to the *Stradone* Estate. The Testator, therefore, declares it to be his intention to connect the two Estates. Now how are these words controlled by the Codicil, so as to exclude the Daughter of *Thomas Burrows*. The expression "Head to a Family," is not an exclusion of a Female Head. The words, "closely entailed," have reference to the existing Settlement, which includes Daughters as

well as Sons. The kindness to the different Branches of the Family is not confined to Males only. It is impossible to deny that the general intention of the Testator is to keep the new Estate consolidated with the *Stradone* Estate. He never could intend that the eldest Son should have an Estate for Life only, and that his younger Brother should have an Estate Tail. The general gift of the Inheritance to *Thomas Burrows*, is so far qualified as to let in the Limitations of the Settlement, and no farther: both Male and Female Descendants, therefore, should be included. *Blackburn v. Stables* (c), *Jervoise v. D. of Northumberland* (d).

The Clause of Forfeiture, like all other clauses of the same nature, must be construed strictly.

Mr. Sugden, in reply:—

It has been said that *Thomas Burrows* had no power to defeat the Limitations of the *Stradone* Estate. I admit that he had no power to do it, by himself: but he had that power by joining with the Tenant in Tail. No body but *Thomas Burrows* can defeat those Limitations in his Life-time. A base fee, indeed, may be created, but still all the Remainders would take effect.

Then, as to whether *Thomas Burrows* is to be Tenant for Life, or Tenant in Tail. When the Testator says that he means to increase the *Stradone* Estate, he intends to entail the new Estate as closely as the law will allow him. The Settlement of the *Stradone* Estate is to be taken as a precedent at the time when it was made: and, if so, *Robert Burrows* must be made Tenant

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for Life. We have, in no respect, departed from the Limitations of that Settlement. The Father and Son were there made Tenants for Life: and here also we make the Father and Son Tenants for Life. Our Limitations, regard being had to existing circumstances, are precisely the same as those of the Settlement referred to. It was observed in *Perrin v. Blake* (e) that, under a Limitation to *A.* and the Heirs of his Body, *A.* takes first an Estate for Life, and then an Estate Tail. Now under our Limitation *Robert Burrows* will take an Estate for Life; and he has an Estate for Life in the other Estate also; and, if he does no act to defeat the Limitations of the Settlement, both Estates will go precisely to the same Persons.

In *Blackburn v. Stables*, the question was whether one man should have an Estate Tail, or in strict Settlement. *Leonard v. Earl of Sussex*, is a powerful authority for what we are contending for (f). *Papillon v. Voice* (g) is the strongest case, upon the subject, that ever came before a court of justice. Who are closely to entail the Estate? Why the Trustees who are to Purchase it. The subject of the entail did not exist when the Testator died; and the Trustees must conform to the Rule of the Court. Where there is an intention to entail strictly, all Persons born in the Life-time of the Testator, must be made Tenants for Life. As to the second Son being made Tenant in Tail, the Testator, had he known that that must be the case, would only have regretted that all the Sons could not be made Tenants for Life. If the Daughters are included, the

(e) 4 Burr. 2579. 1 Black. 672. Dougl. 329.

(f) 2 Vern. 526. (g) 2 P. W. 471.

Estate will not go over if *Thomas Burrows* dies without Male Issue.

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The VICE-CHANCELLOR:—

The Plaintiff in this Case is a mere Trustee, and the object of the Bill is to have the rights of the Co-Defendants declared by the Court, in order that Estates purchased in pursuance of the Trusts of the Testator's Will and Codicil, may be settled upon those Trusts. The *Master* was directed to settle a proper Deed for that purpose; and, under this direction, he had to exercise his own Judgment upon the true construction of the Will and Codicil. Both Parties are dissatisfied with his Judgment, and have taken Exceptions to the Report. The Defendants, *Thomas* and *Robert Burrows*, object that the Limitations of the Settlement in their favour, are not co-extensive with their Rights, according to the true construction of the Will and Codicil. On the other hand, the Defendant *Arnold Burrows* insists that those Limitations are not sufficiently strict, and that the Deed should contain what is termed a shifting Clause, but what, in plain language, may be called a Clause of Forfeiture, by *Thomas* and all his Issue, in case he should do, or concur in any act to alien the *Stradone* Estate.

It often happens that the Court is called on to expound a meaning and execute a purpose which the Testator himself could not have explained in their detail; and the Court is then driven to the necessity of giving such directions as it conceives to be nearest to a probable and rational purpose in the Testator's mind. The present Case is of that class. I think it reasonably clear that the Testator intended to continue the Name

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and augment the Property of the Family Stock from which he sprang, and, for that purpose, added his own Fortune to the Family Estate, and wished to keep them permanently united ; but he had no distinct idea of the detail through which his meaning could be executed. He knew that the Defendant, *Thomas Burrows*, was in possession of the Family Estate, under an Entail ; but he evidently was ignorant of the legal nature of an Entail, and of the means by which it might be continued or destroyed. His Will is in these words : “ The Residue of my Fortune to be laid out in Land as contiguous as possible to *Stradone*, in the County of *Cavan, Ireland*, to be added and closely entailed to the Family Estate now in the possession of my relative, *Thomas Burrows*. Until such Purchase is made, to allow *Thomas Burrows*, or his lawful Heir, Two and a half per Cent on the amount of the said Residue.” And then he appoints that *Thomas Burrows*, the Defendant *Arnold Burrows*, and the Plaintiff, his Executors. If his Will had rested there, I think his purpose might have been executed without assuming great latitude of construction. The Estates to be purchased must have been limited to every Person who could take under the Settlement. But the important words, “ Closely Entailed,” would require the Limitations to be as strict as the rules of Law would permit ; and every Person *in esse* at the Testator’s death must have taken a Life Estate, and no more. If this exposition of the Testator’s meaning could be deemed conjectural, I think it would be a conjecture approaching more nearly to a rational construction of Intention than any other which could be imputed. A year afterwards, he made a Codicil, the intention of which evidently was to confine the Limitations in favour of *Thomas*, to his Issue Male, and, at the

same time, to prevent an alienation of the *Stradone* Estate. His words are: " My object in wishing to improve the *Stradone* Estate, is to have a head to the Family, who I hope will be kind and attentive to the different branches. Should *Thomas Burrows* die without having Male Issue, or dispose of *Stradone* out of the Family Line, it is my desire that the Residue of my Fortune should go to *Arnold Burrows*, Son of Colonel *Thomas Burrows*, of *Hill-street*, or his nearest relative in the Male Line." Under the united effect of the Will and Codicil, the *Master* has framed Limitations excluding the Female Issue of *Thomas*, and giving to him and *Robert* (his only Issue *in esse* at this time) Estates for Life, with Remainders, to their Issue respectively, in Tail Male. So far, I do not think the Limitations imposed, by the *Master*, on *Thomas* and his Issue, are more strict than they ought to be: and there is one point in which I think the *Master* ought to have fettered the power of *Thomas* to alienate the Testator's Estate more than he has done. As the Limitations stand, *Thomas*, having the Estate of Freehold in possession, by joining with any Tenant in Tail, may bar the Remainders, and alien the Estate; which would be obviously inconsistent with the general intent of the Testator. If the *Master* had limited the first Estate of Freehold to Trustees and their Heirs, during the life of *Thomas*, in Trust for him, (a course now frequently adopted in Family Settlements,) *Thomas* would be disabled, by any act during his life, to alien the Estate; and so far the Testator's Estate would remain closely entailed. Such a Limitation would effectuate the clear intention of the Testator, of preventing an alienation of his own Estate, which must be implied to have been as much his object

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as preventing an alienation of the *Stradone* Estate, I therefore think the Limitations in favour of *Thomas* should be varied, by vesting the first Estate of Freehold in Trustees during his Life, in Trust for him, without Impeachment of Waste; and the other Limitations are proper.

On the part of *Arnold*, it was insisted that, under that member of the sentence in the Codicil which provides against *Thomas* disposing of the *Stradone* Estate out of the Family Line, the shifting clause I have adverted to ought to be introduced by way of proviso. It is not, however, the usage of a Court of Equity to inflict or enforce forfeitures. In giving effect to the Executory directions of a Will, the Court will guard all rights by restrictions and Covenants in the way of Limitations: but, whether the clause insisted on should be called a forfeiture or a limitation over, is not material; for I have found no instance in which the Court has gratuitously imposed a Limitation, amounting to a forfeiture, against one man, for the act of another with whom he is not in privity. But, in the present Case, such a proviso would be singularly absurd: the act of *Thomas* in alienating the *Stradone* Estate, could, in no contingency, be injurious to *Arnold* or his Issue; for they are not in that "Family Line" which could ever inherit the *Stradone* Estate under the entail to which the Testator alludes; and, on the contrary, the effect of such a Clause would be to impose a Forfeiture of the Testator's Estate on the Issue of *Thomas*, as resulting from the construction of a Codicil, the obvious object of which was to keep both the Estates united and descendible to them.

The next consideration is, what ought to be the Limitations in failure of Issue Male of *Thomas*. The *Master* has given an Estate for Life to *Arnold* and his Brother, successively, with remainders to their Issue in Tail Male, and with remainder to any future Issue Male of their Father. So far I think the *Master* is right: but, the question is, whether, under the words, "the residue of my Fortune to go to *Arnold* or to his nearest relative in the Male Line," the Limitations should be carried into the Ascending Line: the words are, certainly, capable of being extended to the Ascending Line of Ancestors indefinitely. But, if you once travel out of the Descending Line, I know of no particular stock at which the Court ought to stop whilst the Pedigree of the Family affords subjects. I think it was reasonable, in failure of Issue Male of *Arnold*, to insert Limitations in favour of his younger Brother, and of any future Issue Male of his Father: they are reasonably consistent with the words, "nearest Relative in the Male Line." To that extent, therefore, I think the Limitations of the Settlement should remain as approved by the *Master*, and that those to the Ascending Line should be expunged: and I think that the *Master* has come to a fair and reasonable conclusion in limiting the Remainder in Fee to *Arnold*. With these variations, I think that the Report of the *Master* approving the Settlement, must be confirmed.

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*Interest.
Vendor and Purchaser.*

The amount of Deterioration of an Estate pending a Suit for specific Performance, having been ascertained by an Issue, the Purchaser was allowed it out of his Purchase-money, which he had paid into Court under an order, with Interest from the time when he paid in his Money. *Also
you will find
you -*

FERGUSON v. TADMAN.

RUCK v. TADMAN.

IN May 1818 *Thomas Colyer*, one of the Defendants, purchased a Farm, in *Kent*, of the Plaintiffs. By one of the Conditions of the Sale, the Purchaser was to be entitled to possession of the Farm at Michaelmas 1818. He accordingly attended there, on that day, for the purpose of receiving the possession; but the Defendants *M. and L. Tadman*, who were in possession, refused to quit. *Colyer* thereupon gave notice to the Vendors, that he should require them to reimburse him any loss he might sustain in consequence of not receiving possession of the Premises pursuant to the Conditions of Sale, or in respect of the Deposit he had paid to the Auctioneer, or the residue of the Purchase-money; and that he was ready to complete his Purchase. The Vendors having informed him that they were about to proceed against the *Tadmans* to compel them to deliver up the possession of the Premises to him, he refrained from rescinding the Agreement. In November 1818 the Vendors filed two Bills, against *Colyer*, the *Tadmans*, and other Persons, to enforce performance of the Contract. In 1819 a Receiver was appointed of the rents and profits of the property, in both suits. The Causes were heard in December 1821, when the usual inquiry as to Title was directed to be made. The *Master* having approved of the Title, and the Causes being set down for further directions, *Colyer*, in June 1823, presented two Petitions to the Court, complaining that, since Michaelmas 1818, the Estate had

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become much deteriorated in value, by mismanagement and neglect, and praying for an Inquiry to ascertain the amount of such deterioration, and that he might be at liberty to deduct, out of the Purchase-money, what the *Master* should find to be proper to be allowed him. By the Decree on further directions, it was ordered that *Colyer* should pay his Purchase-money into Court, on or before the 29th of September 1823: that the Receiver should then deliver up to him the possession of the Premises, and that all proper Parties should join in conveying them to him: and an Inquiry was directed to ascertain to what extent the Estate had been deteriorated since Michaelmas 1818. *Colyer* paid his Purchase-money into Court on the 27th of September 1823, and was then let into possession of the Property. The *Master* found the deterioration to amount to 787*l.* 3*s.* 5*d.* The Plaintiffs and the Defendant *Colyer* both excepted to the Report; the former alleging that the Premises had not been deteriorated at all, and the latter that they had been deteriorated to the extent of 1,656*l.* 9*s.* 8*d.* Upon the Exceptions coming on to be heard, an Issue was directed to be tried at the next Spring Assizes, in order to ascertain whether the Premises were, upon the whole, in a worse state and condition at Michaelmas 1823, than they were at Michaelmas 1818, either by occasion of the Buildings not having been kept in repair, or by reason of the Lands having been used in an unhusbandlike and improper manner; and, if they were, to what amount and value in the whole. The Jury found that the Property was in a worse state and condition, from the causes before mentioned, to the amount and value of 1,652*l.* Upon this finding, *Colyer* petitioned the Court that the amount found by the Verdict, with Interest, at 4*l.* per

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Cent, from the day on which he paid in his Purchase-money, might be raised by sale of a competent part of the Stock in which that Money had been invested, and be paid to him, and that he might also to be paid his Costs incurred in the trial of the Issue. The Petition now came on to be heard.

Mr. *Heald*, and Mr. *Parker*, for the Petitioner, said that the Jury had found that their Client was entitled to the whole of the Sum he had claimed, except 4*l.*; and that he was entitled to Interest on the amount of the Verdict.

Mr. *Horne*, and Mr. *Boteler*, for the Plaintiffs, said that it appeared, from the Order on further directions, that the Damages were to be considered as separate from the Purchase-money; because the Court, without regarding the latter part of the Petition that was then heard, ordered *Colyer* to pay in the whole of his Purchase-money, and referred it to the *Master* to inquire as to the amount of the deterioration, without making any reservation as to whether it was to be deducted out of the Purchase-money; that if that were to be the case, the Prayer of the present Petition was wrong, for the Petitioner would then be entitled to so much Stock as the 1,652*l.* would have purchased when the Money was paid in, the Funds being higher at that time than they were at present: that it was a mere question of Damages, and, therefore, the Court would not allow Interest.

The VICE-CHANCELLOR:—

The Petitioner purchased the Property in question, in 1818, and, in that year, possession ought to have been

delivered to him. But the possession was detained until 1823. The Purchaser alleged that, by the default of the Vendors, the Estate was worth less when he was about to take possession of it, than it was at the time of his Purchase. The Court then called on him to pay in his Purchase-money: and, if the Court, when it directed the inquiry as to the amount of the deterioration, had been asked by the Purchaser to make a special reservation as to the Sum which the *Master* should report him to be entitled to, such a reservation would have been made; because the Purchaser, to the extent of the deterioration, paid in his own Money, and not the Money of the Vendors. It appeared that the Purchaser insisted on 1,656*l.* as the Sum he was entitled to: but the *Master* was of opinion that 767*l.* was all that he ought to be allowed. Both Parties excepted to the Report; and the Jury have found that the Purchaser was entitled to the full amount of what he demanded; for the 4*l.* is not worth considering. Upon that Verdict, if there had been that reservation, the Court would have ordered the *Master* to ascertain what proportion of the Stock in which the Purchase-money had been laid out, the Purchaser was entitled to. But, as the Party has shut out that question, the only point to be considered is, whether the Purchaser is entitled to have his Over-payment returned, with Interest, at 4*l.* per cent, from the time it was made. I think it perfectly clear that he is entitled to have it so returned. As to the laying out of the Money in the Funds, the Court can take no notice of that circumstance. The next matter to be considered, is the Costs of the Trial. This is not a question of Conduct in which both Parties are implicated: but the Vendor was bound to take care

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against this deterioration: and I should not make the Purchaser the allowance he is entitled to, if I made him pay the Costs of the Trial.

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Will.
Constructive
Trust.

A Testator having given an Annuity to one of his next of Kin, and expressed a reason for giving nothing to the others, gave the Residue of his Property to his Wife, recommending to her and not doubting that she would consider his near relations, as he would have done if he had survived her: held that there was no Trust for the next of Kin, but that the Wife took the Residue absolutely.

198 May 6/16
post 542.
5 Sim. 26. 132. Williams v Williams 1 Sim. N. S. 363.
1 Sch. & Lev. 111. Reeves v Barker 18 Beavan 374.
2 May 6/16. ab 142. Paton v Watts 4 L. Rep. Eq. 152

SALE v. MOORE.

EDWARD MOORE, Clerk, made his Will in the following words: "I give and bequeath to my beloved Wife, *Mary Moore*, all my worldly Substance, of what kind or nature soever, or wheresoever, upon Trust for the following purposes: 1st, That she do pay all my just Debts and Funeral Expenses; also that she pay the sum of 100*l.* to the Treasurer or Assistant who call themselves the Governors of the *Salisbury Infirmary*; which Sum I charge on my Personal Estate, and desire it may be applied to the charitable uses of the said Society: also that she pay the sum of 50*l.* a year to my Sister, *Fanny Moore*, of *Rumsey* in the county of *Hants*, Spinster, during her natural life: which sum I hereby charge on my Personal Estate: my Brother being in affluent circumstances, and my eldest Sister being already well provided for by me, will, I trust, be considered by them as a sufficient reason for my not leaving them any thing in this my Will, as I could not do it without taking from my Wife's Property, who is more in need of it. The remainder of what I die possessed of, after the payment of the aforesaid Debts and Legacies, I leave to my dear Wife aforesaid, recommending to her and not doubting, as she has no Relations of her own Family, but that she will consider

my near Relations, should she survive me, as I should consider them myself in case I should survive her. And I hereby appoint my said Wife sole Executrix of this my Will."

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The Testator died in 1812, leaving *John Moore*, *Fanny Moore*, and *Mary Moore*, his Brother and Sisters, his only next of kin.

Mary Moore, the Testator's Widow, by her Will, dated in the year 1822, but which did not recite or in any manner refer to her late Husband's Will, gave Legacies to the Testator's Brother and several other Persons, and Annuities to the Sisters. She died shortly after the date of her Will.

The Bill was filed, by the Testatrix's Executors, against the Legatees and Annuitants under her Will. It alleged that *Mary Moore* and *Fanny Moore*, the Testator's Sisters, not only claimed the Annuities given to them by the Testatrix, but also to be entitled, together with *John Moore*, the Testator's Brother, to the whole of the Property possessed by the Testatrix, and formerly belonging to the Testator; and that they contended that she took only a Life Interest in such Property under the Testator's Will, and that they were then entitled to the same, by virtue of the Trust in that behalf created in the Testator's Will; and that *Mary Moore* and *Fanny Moore* also claimed to be entitled to the Annuities given them by the Testatrix. The Bill prayed that the Trusts of the Wills of the Testator and Testatrix might be carried into execution under the Decree of the Court.

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The Defendants, *John Moore* and *Fanny Moore*, by their Answer, submitted that, by the Testator's Will a Trust was created, in favour of his next of kin, of the residue of his Personal Estate, subject to the life interest therein of the Testatrix. The Defendant *Mary Moore*, by her Answer, claimed to be entitled to the Annuities given to her by the Wills of the Testator and Testatrix, and also, as one of the Testator's next of kin, to a share of his Personal Estate given, as she submitted, by his Will, to his near relations, after the decease of his Wife, subject to a power of appointment, among such near relations, vested in the Testator's widow, which, as the Defendant submitted, the widow did not exercise.

The *Master*, in pursuance of a reference made to him by the Decree, found that the Defendants *John Moore*, *Fanny Moore* and *Mary Moore* were the only next of kin of the Testator at the decease, both of the Testatrix and of the Testator.

The Cause now came on to be heard for further directions.

Mr. *Heald*, and Mr. *Seymour*, for the Plaintiffs :—

The questions in this case are, first, whether, by the residuary Clause in this Will, a trust is created for the persons whom the Testator designates as his near relations.

This Clause does not come within the line of Cases in which it has been held that implied or constructive trusts were created; for the objects of the Trusts, and the Interests that those objects are to take, are not

sufficiently defined. The expression "near relations," is not definite, nor is the word "consider" sufficiently explicit. If the Testator had not made a bequest to his widow, he would have provided for his Brother and Sister; and, if the Court holds that the next of kin are meant by the words "near relations," it would not meet the Testator's intentions. In *Wright v. Atkyns* (a), the words were much stronger, and yet the House of Lords decided that no Trust was created. Secondly, the Testatrix has given Legacies to all these next of kin, and has thereby complied with the Testator's recommendation. She has made these next of kin objects of her bounty; and how can the Court say that she has not considered them as the Testator would have considered them?

Mr. Barber, for some of the Legatees under
Mrs. Moore's Will:—

There is no Trust in this case. It would be strange to hold that the Widow was a Trustee for the Testator's Brother and Sisters, as the Testator apologizes for not leaving any thing to two of them. All the cases upon the subject of constructive Trusts decide that, if there is a discretion in the Legatee, if he is to leave as much as he pleases, and no more, the bequest is absolute. *Wynne v. Hawkins* (b). The Testator does not desire his wife to leave the *whole* of his property to his near relations, but only says that she is to *consider* them. Could the Court declare that the Widow was, under this will, tenant for life only of the residue, when she

(a) See 1 Turn. 143. The appeal to the House of Lords appears not to be reported.

(b) 1 Bro. C. C. 179.

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was not to leave the whole of it to her Husband's relations, but so much only as she thought proper. *Malim v. Keighley* (c), *Heneage v. Lord Andover* (d).

The Vice-Chancellor: There is a further term of uncertainty in this Will: the Widow is to consider, the near relations of her husband, as he himself would have considered them had he survived her.

Mr. Horne, and Mr. Knight, for some of the other Legatees under the Testatrix's will:—

There is no medium between holding the Widow's interest, in the residue, either a life-interest, or an absolute one. If she can dispose of a shilling of it, there is no Trust. The Testator says, explicitly, that he leaves nothing to his Brother and elder Sister, and assigns, as a reason for it, that they were in affluent circumstances. Besides, she was to consider his near relations as he would have considered them. By what index was her bounty to be directed. The Testator, too, calls the property his wife's property.

Mr. Rose, Mr. Wray, Mr. Blenman, and Mr. Hayter, appeared for the rest of the Legatees, and relied on *Heneage v. Lord Andover*, *Pushman v. Filliter* (e), *Sprange v. Barnard* (f), *Tibbits v. Tibbits* (g), and *Horwood v. West* (h).

(c) 2 Ves. J. 333.

(d) As this, though it is a Case of considerable importance, has not been reported, a Report of it is given at page 542, *post.*

(e) 3 Ves. 7.

(g) See 19 Ves. 664.

(f) 2 Bro. C. C. 585.

(h) See 1 Sim. & Stu. 389.

Mr. *Tinney*, for the Defendant *Mary Moore* :—

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This case turns on the construction of the word "consider." It does not imply a power to exclude any one of the objects pointed out by the Testator, but means that they should all be kept in view for their benefit. The whole fund is placed in the Widow's hands, with a direction that, as to the whole, she is to consider her Husband's near relations. "Consider," means that she is to consider which of them wants more than another. She is to consider whether one is to take for life, or absolutely; and whether one is to have more or less than another. She must distribute it amongst the relations: but, as some were well provided for, the Testator leaves the amount of the shares to his Wife's discretion. The sense of the expression, "as I should consider them myself" is, that the Widow was to exercise consideration as the Testator would have done, if he had not had her to provide for. The case of *Heneage v. Lord Andover* has been much relied on: but, in this Will, there is no expression like the words "unfettered and unlimited," which occurred in that case. *Parsons v. Baker* (i).

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Mr. *Pemberton*, for the Defendants *John Moore* and *Fanny Moore*, the two other next of kin of the Testator :—

The construction which the Court always puts upon the words "near relations," is, "next of kin." (k) The Testator, in the commencement of his Will, gives the whole of his property to his Widow, *upon Trust*. It is quite clear, therefore, that he did not mean to give it to her absolutely. He then begins to declare the

(i) 18 Ves. 476.

(k) *Brown v. Higgs*, 5 Ves. 502.

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Trusts. *Fanny Moore*, one of his Sisters, was in indigent circumstances, his Brother and other Sister were affluent. He, therefore, makes an immediate provision for his Sister *Fanny*; but defers his bounty, to his Brother and other Sister, until the decease of his Widow, when the reason for not making an immediate provision for them would cease. By the direction, given to the Widow, to consider the Testator's near relations as he would consider them, he meant to say: "place yourself in my situation, and dispose of my property to those to whom I have told you that I should dispose of it." We have, therefore, in this case, both certain objects and certain subjects of Trust. *Eade v. Eade* (*1*), which was confirmed, on appeal, by Lord *Eldon*, C. The widow has not attempted to exercise the power which the Testator gave her. She has indeed bequeathed Legacies to his Brother and Sisters; but they are given out of her own property.

The VICE-CHANCELLOR:—

There is no ground, in this case, on which a Court of Equity can imply a Trust as to any part of the Testator's family. The first case that construed words of recommendation into a command, made a Will for the Testator; for every one knows the distinction between them. The current of decisions, has, of late years, been against converting the Legatee into a Trustee.

Supposing that the words in this case would create a Trust, those words are coupled with some degree of uncertainty. Who are the objects of the Trust? Did the Testator mean relations at his own death, or at his

wife's death? Did he mean that she should have the liberty of executing the Trust the day after his death? Various other considerations might be introduced to show that the objects are uncertain. There is no ground for taking, from the Widow, what the Testator has not taken from her, but vested in her absolutely. The case of *Dawson v. Clark* (m), is a strong authority to show that the Court ought not to take away an absolute gift. He gives to her: "all his worldly substance, of what nature or kind soever and wheresoever, upon Trust for the following purposes:" He must, therefore, be intended to have all the purposes in his contemplation. He then says: "my Brothers being in affluent circumstances, and my eldest Sister being already well provided for, by me, will, I trust, be considered by them, as a sufficient reason for my not leaving them any thing in this my will." Is not this a conclusive indication that, in the preceding part of the will, he had pointed out every Trust that he intended should fix upon the property. He then proceeds: "as I could not do it without taking from my wife's property, who is more in need of it." Why does he not take it from her? He might have made her tenant for life only. But he says that he takes nothing from her. Where then is the ground upon which a Trust could attach? He then goes on: "The remainder of what I die possessed of, &c." Now the word "consider" is a relative term. How is she to consider them? As he would have done? How is the Court to find out how he would have considered his relations?

The conclusion, therefore, that I come to, is that there is no Trust created in this case: and, in the view that

(m) 15 Ves. 409.

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CASES IN CHANCERY.

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I have of it, I think that there is nothing in the decided Cases that I contravene.

Declare that the Testatrix, *Mary Moore*, took the residue of the Personal Estate of the Testator *Edward Moore*, under his Will, not subject to any Trust.

Sess. 1824.

Will.
Construction.
Trust.

Testator, after giving his Real and Personal Estates to his Wife in fee, said that he had so given the same to her, 'unfeoffed and unlimited,' in full confidence that, in her future disposition thereof, she would distinguish the Heirs

of his late Father, by devising the whole of his Estate, together and entire, to such of his Father's Heirs as she might think best deserved her preference: Held that no Trust was created.

White v. Biff. 15. Ann. 33
B. Inst. 1. Rec. 1. 2. 4. 3. 6. 1. 3. 8
Williams v. Williams 1. Rec. 1. 3. 3.
Cookson v. Bingley 3. D. M. 4. 2. 672.
Hus. Kitter 1. 1. 4. 2. 2. 248.
Skeene 1. 1. 3. 2. 374.

acte 5. 1. 1824 May 6. 66.
5. Ann. 26. 1. 1. 2. 4. 2. 11. 2.
179. 4. 5. 2. 1. 5. 1. 1. 1. 1.
Rec. 1. 1. 1. 1. 1. 1. 1. 1. 1.
Rec. 1. 1. 1. 1. 1. 1. 1. 1. 1.
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Fees, Perquisites and Emoluments to the said Offices belonging; and all and singular other my Real Estates and Hereditaments whatsoever, in *Great Britain*, with their and every of their Rights, Members, and Appurtenances, and the Reversion and Reversions, Remainder and Remainders thereof, and of every part thereof, and all and singular my Estate and Interest therein, unto my dear Wife, *Arabella Walker Heneage*, to hold the said Lands, Tenements and Hereditaments, and all other my Real Estate hereinbefore particularly mentioned; and set forth, unto the said *Arabella Walker Heneage*, her Heirs and Assigns for ever. I give and bequeath unto the said *Arabella Walker Heneage*, all my Personal estate whatsoever and wheresoever, and of what nature or kind soever, to hold the same to her the said *Arabella Walker Heneage*, her Executors, Administrators and Assigns for ever. And I earnestly recommend, to my said Wife, the care and protection of my affectionate friend *Arabella Anne Caroline Jenny Pigott*, most heartily beseeching my said Wife that she will permit and suffer the said *Arabella Anne Caroline Jenny Pigott* to live and reside with her, and that she will afford to the said *Arabella Anne Caroline Jenny Pigott* the same kind attention and tenderness which has been always shown her in my life-time. And I seriously and warmly entreat my said Wife, at her decease, to settle and assure, to two Trustees, such part of my Real Estate as she shall think proper, for the special purpose of securing to the said *Arabella Anne Caroline Jenny Pigott*, during her natural life, (in case she survives my said Wife, but not otherwise,) such an Income as will enable the said *Arabella Anne Caroline Jenny Pigott* to enjoy all those comforts of life which she has hitherto been used and accustomed to, leaving the amount of such Income to the entire discretion of my said Wife. And

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I have devised and bequeathed the whole of my said Real and Personal Estate, hereinbefore particularly set forth, unto my said dear Wife (and which she must acknowledge not to be inconsiderable) unfettered and unlimited, in full confidence, and with the firmest persuasion that, in her future disposition and distribution thereof, she will distinguish the Heirs of my late Father, by devising and bequeathing the whole of my said Estate, together and entire, to such of my said Father's Heirs as she may think best deserves her preference. And I constitute and appoint her, my said dear Wife, the said *Arabella Walker Heneage*, sole Executrix of this my Will."

The Testator, by a Codicil, charged his Real Estates with two Annuities, which he gave to *Arabella Calcraft*, one to be paid after his own death, and the other after his wife's, and died in February 1806. His widow, after his decease, proved his Will and entered into possession of his Real Estates, and possessed herself of his Personal Estate.

Mrs. *Heneage*, by her Will, dated the 25th of May 1813, devised all her Real Estates to Trustees, for a Term of 500 years, to commence at her decease, and, subject thereto to the Respondent *George Heneage Walker Heneage*, (therein called *George Heneage Wyld*,) the eldest Son of the Respondent *George Wyld* by *Mary Dionysia*, his Wife, with Remainder to Trustees to preserve, &c. with Remainders to his first and other Sons in Tail Male, with like Remainders to the other Sons of Mr. and Mrs. *Wyld*, and to their Sons respectively, with Remainders, to the Sons of *G. H. W. Heneage* and of his Brothers, in Tail General, with Remainders to the first and other Daughters of *G. H. W. Heneage* and

of his Brothers, successively, in Tail Male, with Remainders to the first and other Daughters of Mr. and Mrs. *Wyld*, successively, in Tail General, with the ultimate Remainder to the Respondent *Francis John St. Quintin*, in fee. The Trusts of the Term of 500 years were for raising 500*l.* for Miss *Pigott*, and 700*l.* to be paid to the Testatrix's Executors; and an Annuity of 1,000*l.* for Miss *Pigott*; and also for raising some small Annuities for the Testatrix's servants, and 8,000*l.* to be applied in paying her own and her late Husband's debts. And the Testatrix bequeathed her Household Furniture, Plate, Diamonds, &c. in her Mansion House, to go as Heir Looms with the Mansion House. And she gave, to *Jenny Pigott*, a gold watch and chain, and to the Rev. *J. Cope*, a silver inkstand, both of which had belonged to her late Husband. And the Testatrix gave to her nephew, the respondent, *E. W. Caulfield*, the next Presentation to one of her Rectories. And she gave the residue of her Personal Estate to Trustees, in trust for *Jenny Pigott* and *Arabella Anne Caroline Jenny Pigott*, equally, during their lives and the life of the longest liver, and, after the decease of the survivor, in trust for the said *Jonathan Cope*, Clerk, and all the Children of the Testatrix's Sister *Anne Bolleville* by her late Husband *Toby Wade Bolleville*, to be equally divided between them; and, in case all such Children should die before they attained Twenty-one, then in trust for the said *Jonathan Cope*, his Executors, Administrators or Assigns: and she appointed *Lord Andover, Robert Nicholas and George Wyld*, Executors of her Will.

The Testatrix made a Codicil, dated the 20th of March 1814, whereby, after reciting the death of *Jonathan Cope*, she gave to her brother, Sir *Jonathan Cope*, Bart. the gold pencil-case before mentioned; and to *Arabella*

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Calcraft, daughter of the Appellant General *John Calcraft*, her silver inkstand: and, after the decease of the survivor of the said *Jenny Pigott* and *Arabella Anne Caroline Jenny Pigott*, she gave her residuary Personal Estate unto the several uses and purposes thereof declared, for the benefit of all the Children of her said Sister *Anne Bolleville* by the said *Toby Wade Bolleville*. The Testatrix made three other Codicils to her Will, the contents of which are not material to be stated, except that, by the third Codicil, she appointed the Respondent, *Edward Goddard*, a Trustee and Executor of her Will, in the place of *George Wyld*.

The Testatrix died in June 1818, leaving the Respondents *Arabella Diana Duchess of Dorset*, and *Catherine Countess of Aboyne*, her Co-heirs at Law.

Lord *Andover*, *Robert Nicholas*, and *Edward Goddard*, proved the Testatrix's Will and Codicils.

In Michaelmas Term, 59th Geo. 3, *George Heneage Walker Heneage*, and his surviving Brothers and Sisters, filed a Bill, in the Court of Exchequer, against the other Respondents and the Appellants, stating that the Testatrix took, under the Will of the Testator, an Estate in Fee-simple in the Estates devised by his Will, and that she had power to devise the same as she had done by her Will, and praying that the Testatrix's Will might be established, and the Trusts thereof carried into execution, and for the usual Accounts. The Appellant, *Henrietta Arabella Meredith*, in her Answer, stated that she and the other Appellant, *John Calcraft*, were the Co-heirs at Law of the Testator, and also of *John Walker*, the Testator's Father; and said that she was advised that, under the Testator's Will, the Testatrix

took a beneficial Interest, for her Life only, in the Estates devised by the Testator, and in the Residue of his Personal Estate, with a Trust or Power only to devise and bequeath the same, at her death, together and entire, to such of the 'Heirs' of the Testator's Father as she thought best; and that the Testatrix ought to have exercised such Trust or Power in favour, either of her the Appellant, *H. A. Meredith*, or of the other Appellant, *J. Calcraft*; and that the Testatrix not having done so, her Will and Codicil, so far as regarded the beneficial Interest in the Testator's Real Estates, and the Residue of his Personal Estate, were void, except as to the devises and bequests in favour of *A. A. C. J. Pigott*; and that either she, the said *H. A. Meredith*, and the other Appellant, *John Calcraft*, were absolutely entitled to the Testator's Real Estate, and to the Residue of the Testator's Personal Estate, or; else, that the Appellants, as the Testator's Co-heirs, were absolutely entitled to the said Real Estates; and that the Appellants and the Respondents *Arabella Bridget, St. Quintin*, and *Mary Dionysia Wild*, as the sole next of Kin of the Testator, and the Respondents, *Lord Andover, R. Nicholas*, and *E. Goddard*, as Executors of the Testator's Widow, were entitled to their respective Distributive Shares of the Testator's Personal Estate. And the Appellant *H. A. Meredith*, accordingly, insisted upon her right to a Moiety of the said Real Estates, and either to a Moiety, or an eighth part of the Residue of the Personal Estate.

The Appellant *J. Calcraft*, in his Answer, submitted that, by the Testator's Will, a Trust was imposed on the Testatrix to leave the whole of his Real and Personal Estates to one of the Heirs of the Testator's late

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Father : and he submitted that the Testatrix had not duly exercised her power over the said Estates, inasmuch as she had not selected one of the Heirs of the Testator's late Father : and, as one of the Heirs of the Testator and his late Father, he claimed the benefit which, under the Testator's Will, had been raised for the Heirs of the Testator's Father, in the event of the Power of Selection, given to the Testatrix, not being duly executed.

The Cause was heard on the 12th June 1820, when the Wills and Codicils of the Testator and Testatrix were declared well proved ; and inquiries were directed to be made to ascertain who were the Heir at Law and next of Kin, of the Testator and his Father, at the dates of the Testator's Will and Codicil, and at the time of the Testator's death, and also at the dates of the Will and Codicils of the Testatrix, and at the time of her death ; and whether the persons to whom the Testator's Real and Personal Estate were given by the Testatrix's Will, were related to the Testator's Father.

The *Master* reported that, at the date of the Testator's Will, the Testator was Heir at Law, and the Testator and his two Sisters, the next of Kin of the Testator's Father ; and that, at the date of the Testator's Codicil, the next of Kin of the Testator's Father, were the Testator, the Appellants, and three other Persons ; and that, if the Testator had been dead, without Issue, at the date of his Will, his two Sisters, *D. Meredith* and *C. A. Calcraft*, would have been the Co-heirs at Law of the Testator's Father, and also his next of Kin ; and that, if the Testator had been dead, without Issue, at the date of his Codicil, the Appellants would have

been Heirs at Law of the Testator's Father, and the Appellants and three other Persons, would have been the next of Kin of the Testator's Father; and that, at every other period mentioned in the Decree, the Appellants were the Heirs at Law, and two of the next of Kin both of the Testator and his father.

And the *Master* also found that the Appellant *John Calcraft* was the Heir at Law and Personal Representative of one of the Testator's Sisters; and that the Appellant *Henrietta Arabella Meredith* was the Heir at Law and Personal Representative of the other Sister. And the *Master* certified that the devisees of the Real Estates under the Testatrix's Will, were the great Grandchildren of the Testator's Father; but that the other Persons named in the Testatrix's Will and Codicils, were not at all related to the Testator's Father.

The cause having come on for further directions, the question was: whether *Arabella Walker Heneage* took, under the Will of *John Walker Heneage*, the Real and Personal property, thereby devised and bequeathed to her, subject to a Trust for the Heirs of *John Walker*.

The *Lord Chief Baron* delivered his opinion upon this question, to the following effect (a):

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In this case the Bill is filed by the Devisees in Trust under the Will of *Arabella Walker Heneage*, who was the Widow of *John Walker Heneage*, Esq., against the two Co-heirs at Law, and some of the next of Kin of Mr. *Heneage's* Father, *John Walker*, the former being also

(a) Mr. *Hayter*, who was one of the Counsel in the Cause, kindly furnished the Reporter with the Note of the Judgment, which is inserted in the text.

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the Co-heirs of Mr. *Heneage* himself. I conceive this to be a sufficient description of the Defendants, for the purpose of the present consideration.

The controversy arises upon the Will of Mr. *Heneage*; and the question is, whether, under his Will, Mrs. *Heneage* took the absolute interest in his Real and Personal Estates, and had, therefore, a right to dispose of them in favour of the Plaintiffs, as she has, by her Will, declared her intention to do: or whether she was only a Trustee, with an interest in herself merely for her own life, for the benefit of the Defendants, or some of them, with a power of selecting some or one of them in preference to the others or other of them. I use the word *Personal Estate*, because it is used by Mr. *Heneage* in his bequest: and it must, therefore, be necessary, in the construction of his Will to observe upon the *Personal Estate*, though his *Personal Estate* was, as appears by the *Master's* report, insufficient to pay his debts; and the decision must be confined to his *Real Estate*.

This question must be resolved by a due attention to the language of Mr. *Heneage's* Will. What then is the true construction of all the words he has used? Do they impose a Trust on Mrs. *Heneage*, and are they imperative upon her with respect to the disposition of the property: or do they import more than the wish of the Testator that, if she had no serious disinclination, she should dispose of it to or amongst his Father's Heirs, leaving it to her own option, however, to deal with it as her own. It must be admitted that it is purely matter of intention, to be collected from the words of the Instrument, as in all other cases of Wills, where no rule of law interferes.

It is not necessary to travel through the cases which have been furnished by the great industry, and urged by the great ability of the learned Counsel on both sides. Lord *Alvanley*, when Master of the Rolls, in *Malim v. Keighley* (a) has extracted and stated the result of all the cases before that time; and the subsequent cases have, it seems to me, made no alteration. He states the result in the following manner: "Wherever any Person gives Property, and points out the object, the Property, and the way in which it shall go, that does create a Trust, unless he show, clearly, that his desire expressed is to be controlled by the Party, and that he shall have an option to defeat it."

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I will not stay to inquire whether the language of that very learned and excellent Judge is very accurate, and critically correct as applied to the Cases; but I believe they are the very words His Honor used. I think, however, that the result, as stated by him, is sufficiently correct for the present purpose; and I shall consider the passages in the Will accordingly: and I confess that I feel myself bound by the doctrine delivered in it as generally consistent with the doctrines that have prevailed. But I hope to be forgiven if I entertain a strong doubt whether, in many, or perhaps in most of the Cases, the construction was not adverse to the real intention of the Testator. It seems to me very singular that a Person, who really meant to impose the obligation established by the Cases, should use a course so circuitous, and a language so inappropriate and also obscure to express what might have been conveyed in the clearest and most usual terms—terms the most

(b) 2 Ves. J. 333. See also 529. *5 Sim. 45-*

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familiar to the Testator himself, and to the professional, or any other Person who might prepare his Will.

In considering these Cases it has always occurred to me that, if I had myself made such a Will as has generally been considered imperative, I should never have intended it to be imperative; but, on the contrary, a mere intimation of my wish that the Person to whom I had given my Property should, if he pleased, prefer those whom I proposed to him, and who, next to him, were, at the time, the principal objects of my regard. I am happy to reflect that, in this opinion, I have the concurrence of a noble Judge, than whom there has never been, nor, I believe, ever can be a Person more active in investigating the Principles of the Law in all its bearings, or more extensively learned on every legal subject. For, in *Wright v. Atkyns* (c), the *Lord Chancellor* (d) says: "This sort of Trust is generally a surprise on the intention: but it is too late to correct that." Again he says (we know the question was what the word *Family* meant): "I do not believe that the Testator intended a mere Trust; but that must be the construction, if the word 'Family' is properly construed." I have said so much as a justification, or rather as the foundation of the opinion which I entertain, that, though I feel myself bound by the decisions and cannot object to follow them, I do not consider it to be my Duty to extend the rule of construction which has been adopted in them, and to add to the number of those where the Court appears to me rather to have made, than to have given effect to the Wills of Testators.

(c) 1 V. & B. 315.

(d) *Lord Eldon*.

Now as to Mr. *Heneage*'s Will, it devises all and singular his Real Estates, in the clearest manner, to his dear Wife, *Arabella Walker Heneage*, her Heirs and Assigns, and he bequeaths all his Personal Estate to her absolutely ; and then he proceeds : " And I earnestly recommend, to my said Wife, the care and protection of my affectionate Friend, *Arabella Anne Caroline Jenny Pigott*, most heartily beseeching," &c. The words " recommend " and " most heartily beseeching," in the first part of this Clause, are very emphatical, as coupled with the rest of the paragraph. But the subsequent words : " I seriously and warmly entreat my said Wife, at her decease, to settle and assure, to two Trustees, such part of my Real Estates." (These words are, unquestionably, sufficient to create a Trust, and are imperative, unless other words are inconsistent with such a construction. The Testator then proceeds :) " to assure, to two Trustees, such part of my Real Estate, as she shall think proper, for the especial purpose of securing, to the said Miss *Pigott* during her natural Life, in case she survives my said Wife, but not otherwise, such an Income as will enable Miss *Pigott* to enjoy all those comforts of life which she has hitherto been used to, leaving the amount of such Income to the entire discretion of my said Wife."

It has been admitted, by some of the Counsel for the Defendants, that this Clause is not imperative upon Mrs. *Heneage*, but leaves to her discretion to provide for Miss *Pigott*, or not, as she might think proper. I take the admission to be perfectly correct ; and I conceive it to be very clear that Mrs. *Heneage* was left to act at her own option. It is true that some of the words in this paragraph, would, indisputably, be im-

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perative, if the rest of the sentence were constructed in a different manner from what it appears to be. But Mrs. *Heneage* is desired to settle and assure, at her decease, (and not sooner,) such part as she shall think proper, the amount of such income to be left at Mrs. *Heneage*'s entire discretion. Nothing can show, more satisfactorily than this clause does, the anxious and affectionate desire of the Testator to secure a proper provision for Miss *Pigott*: and it may, perhaps, require some attention to prove that the Testator shows clearly (as Lord *Alvanley* states it) that his desire expressed, is to be controlled by Mrs. *Heneage*. Yet, without entering into minute circumstances in the clause, let it be recollected that if it import a trust, Miss *Pigott* must be entitled to a provision independently of Mrs. *Heneage*, and that Miss *Pigott* would have a right to call upon the Owners of the Estate, after Mrs. *Heneage*'s death, to perform that trust, if Mrs. *Heneage* had died without making the provision so much desired by Mr. *Heneage*. But I apprehend that Miss *Pigott* would fail in asserting such a right; for the provision requested was to be at the discretion of Mrs. *Heneage*. That could not be exercised after her death; and a Court of Equity could not have assisted her; for a Court of Equity could not act on the discretion given to Mrs. *Heneage*, which was purely personal to her. And I believe Courts of Equity do not interfere in cases of such discretion, when it is intrusted; except in the case of charity, which has always been considered as an excepted case.

Another reason will occur which confirms my opinion upon this part of the Will, to which I shall advert soon. I shall only observe, for a moment, that the words:

" I seriously and warmly entreat " in the clause respecting Miss *Pigott*, though amply sufficient to raise a trust in a proper place, are used by this Testator where, if my construction is right, they were not meant to imply a Trust : and this consideration may be applied to other words of the like import, unless the accompanying words in the Clause where they occur, prove the intention to create a Trust.

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The Testator then proceeds in these words : " I have devised and bequeathed the whole of my said Real and Personal Estate hereinbefore particularly set forth unto my said dear Wife, and which she must acknowledge not to be inconsiderable :" by which, I conceive, he must refer to the Interest which the former part of the Will had given to her, viz. the absolute Interest in the whole ; and for the quantum of which he seems to demand her gratitude. " I have devised and bequeathed the whole of my said Real and Personal Estate, unfettered and unlimited." Here, to recur to what I have intimated before, it seems evident that he had not intended to encumber his Widow with any Imperative Trust for Miss *Pigott* ; for these words : " unfettered and unlimited " refer to all the Estate he had to dispose of at the instant : and it seems to me difficult to say that, when he used these words in this place : " I have devised and bequeathed the whole of my said Real and Personal Estate hereinbefore particularly set forth unto my said dear Wife, and which she must acknowledge not to be inconsiderable, unfettered and unlimited " that he could have had it in his contemplation to confine the interest, which before had been given to her without limit, to a mere Estate for Life, with only a power of

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selection amongst others, for the Remainder. Then he adds the important words which create the difficulty (and a very serious difficulty) in the case : " I devise to her unfettered and unlimited, in full confidence and with the firmest persuasion that, in her future disposition and distribution thereof, she will distinguish the Heirs of my late Father, by devising and bequeathing the whole of my said Estate, together and entire, to such of my said Father's Heirs as she may think best deserves her confidence." Unquestionably, these words are extremely strong ; but when you connect them with the other words, as you must in construing this Instrument, I doubt much whether they do more than only import a wish, and not impose a command on the part of the Testator.

It has been held (and must I think be admitted) that, if an intention appear, in any part of the Will, to give, to the Devisee, a right or power to spend the Property, words of equal force with those would not be imperative : for the Court, in its acuteness to extract the meaning, conceives it to be inconsistent with the intention to create an imperative Trust, that the Party should have the right or power to dispose of the Property at his pleasure, and, by using that privilege to any extent, leave nothing, or more or less, to remain the subject of a Trust. In this Case the words "unfettered and unlimited," which are used by the Testator to show his opinion of the extent to which he had devised, are, certainly, as strong to manifest an intention to convey the absolute dominion to the Party, as if words had been used more directly authorizing her to spend it, or to deal with it as she pleased.

Again, the Testator seems, in this paragraph, to look back to the bequest to his Wife with complacency and with something like a boast, as if he had conferred upon her an obligation, with respect to Property, as great as he was capable of doing, and had cast upon her a matter of as great bounty as he could; for he describes it as a bounty " unfettered and unlimited," and appears to observe upon it as entitling him to call for her gratitude, and to request her kindness to his Father's Heirs: and yet, in the same breath, if the Defendant's construction is correct, he limits and fetters this Property to a very great extent indeed; and, instead of allowing her to retain the absolute Interest which he declares her to possess unlimited and unfettered, he reduces her to the situation of Tenant for Life only, with a Trust or Power to appoint the Remainder to such of his Father's Heirs as she should prefer, objects not of her Blood, and strangers to her in the eye of the Law.

I confess that, in this view of the Instrument, there is so much inconsistency, that I have persuaded myself that the Testator has not sufficiently exhibited his intention to impose an imperative Trust on his Wife, but that, on the contrary, he has given her all his Property, real and personal, absolutely, and, the more particularly, where the intention is to be extracted from all the words of the Will, without any reference to any rule of Law: for the Heirs take nothing, as Heirs, but they take merely as Devisees, as much as if they were Strangers.

If I am correct in my opinion on this subject, it is needless to proceed further. But, as I am not without

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very serious apprehensions (when I am apprized of much better Judgments than my own) that I labour under a mistake upon this point, (though I certainly have taken all the pains I have been able to consider all the Cases which have been adduced, and all the Arguments which have been urged,) it is necessary that I should proceed to the other question, which is: Whether, if this be a Trust, the objects are sufficiently pointed out. They are described as the Heirs of the Father. Who are the Persons intended by that description? A great deal of argument has been employed upon the subject, on all sides, some insisting that the Heirs at Law of the Testator's Father, at the time of making the Will or Codicil, or at the time of his or his Widow's death, were meant; whilst others contend that the next of Kin of the Testator's Father, at some or one of those periods, were with, or exclusively of the Heirs at Law, the objects intended by the Testator. I think it is difficult to suppose that he meant any but those who answered the description given by him of his object at the time of his Wife's death; for, as she had the whole period of her life to appoint in, the Testator probably contemplated those who should answer, the character marked out, at her death.

In that case, he could have had no individual object or objects in view; for he could not conjecture who might survive his Widow. I own it appears to me that, if he had disposed only of his Real Estate, and it was to be held in trust, his Heir or Heirs at Law at the time of his Widow's death, would have been the Persons intended, the one of them, if there should be more than one, to be preferred to the other or others of them, at the option of the Widow. But, by

this Will, all his Personal Estate is given as the Real Estate is ; and though, as I said before, it appears, by the *Master's Report*, that the Personal Estate was all exhausted in paying the Debts, and, therefore, that there was no Personal Estate to pass by the bequest, yet, in considering the Will, we must construe it as if there had been any given amount of Personal Estate. No doubt, if it appears that the intention was to have an Appointment of Real and Personal Estates to the Heirs at Law, technically speaking, there could be no sound objection to the Execution of such intention ; but I doubt as to the Declaration of such intention by this Will ; and I am not capable of ascertaining, satisfactorily, to whom, under the expression in the Will, the Widow, if she was a Trustee, was to have appointed ; and the Court is now placed in that difficulty. For, as the Widow (if she be a Trustee) has made no Appointment according to the Trusts, the Court is to declare who the objects are ; or, in other words, the Court is to declare who took the Remainder under Mr. *Heneage's* Will, Mrs. *Heneage* being, under the Disposition, Tenant for Life, with Remainder to other Persons. I would ask to whom would they decree both the Real and Personal Estate ? Would they be satisfied that the Testator has pointed out the Heirs at Law of his Father, as the objects to take the Personal as well as the Real Estate ; or the Heirs and next of Kin, or the next of Kin only.

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I confess that I should feel myself greatly embarrassed in arriving at a decision upon this point : and, if the objects be not certain, there is no trust imposed on Mrs. *Heneage*. But my opinion, I fairly confess, is formed, mainly, upon the former point, though I have great doubts as to the latter.

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I have thus taken the liberty of stating some of the reasons which influence my Judgment in favour of the Plaintiffs, in a Case where the intention of the Testator, extracted, as it must be, from all the words of his Will, must govern, and where I think the intention ought to be clearly and satisfactorily expressed, and, the more especially, as, in my opinion, (which is strengthened by that of a very great Judge to whom I have before referred,) the Decisions upon this subject have been, in general, a surprise upon a Testator, and never, in any Case, so much as in this. For this is, *in specie*, a perfectly new Case. There is nothing resembling it any Case I have ever yet seen, or that has ever been pointed out. It will be seen that the Testator ostentatiously proclaims to his Wife that he had given her, and meant to give her the absolute Interest; and yet I am required to attribute to him a covert meaning, from whence it is to be inferred, (and not only inferred,) that, in fact, he gave her only an Interest for Life, something like a species of fraudulent dealing of which the Testator, I think, could not have been guilty.

Graham, B. was of opinion that, by the Testator's Will, a Trust was created, as to the inheritance of the Estates, for the Persons who might be the Heirs at Law of the Testator's Father at the decease of the Testator's Widow.

Wood, B. also was of opinion that a Trust was created as to the inheritance; but that learned Judge thought that the disposition of Estates, made by the Widow, was a due execution of the Trust.

Garrow, B. agreed with the Lord Chief Baron.

The Decree, on further directions, directed the Trusts of the Wills of the Testator and Testatrix to be carried into execution; and declared that *George Heneage Walker Heneage* was entitled to an Estate for Life in such parts of the Testator's Real Estates as were unsold and undisposed of by the Testatrix, as were devised to him by the Will and Codicils of the Testatrix, subject to the term of 500 years, with such Limitations over as were contained in the Will and Codicils of the Testatrix; and that the Bill should be dismissed as against *John Calcraft* and *Henrietta Arabella Meredith*, with Costs to be taxed, &c.

From this Decree the two last-named Parties appealed to the House of Lords.

The Case for the Appellants concluded as follows:

"The said Appellants have appealed to your Lordships against so much of the said Decree made in the said Court of Exchequer, in the said Cause upon further directions, as declares that the said Defendant, *G. H. W. Heneage*, is entitled to an Estate for life in certain parts of the Real Estate, of the said Testator, *J. W. Heneage*, as were unsold and undisposed of by the said Testatrix, *Arabella Walker Heneage*, in her lifetime devised to him by the said Will and Codicils of the said Testatrix, subject to the said term of 500 years, vested in the said Respondents, *R. Nicholas* and *Edward Goddard*, with such Limitations over as are contained in the said Will of the said Testatrix, and as thereupon orders, adjudges and decrees that the said Bill shall stand dismissed out of the Court against the said Appellants, with Costs to be taxed for them; and by all other the orders and directions contained in the said

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Decree of the said Court, upon further directions, touching such parts of the Real Estate of the said Testator, *J. W. Heneage*, as aforesaid, consequent upon the aforesaid Declaration of the said Court, that the said Plaintiff, *G. H. W. Heneage*, is entitled to an Estate for Life in the same, subject as aforesaid: inasmuch as the said Appellants are advised and insist that the Devises and Bequests contained in the said Will of the said Testatrix, *Arabella Walker Heneage*, of the Real and Personal Estates of the said Testator, *J. W. Heneage*, are void, except so far as regards the Provision thereby made for the said *Arabella Ann Caroline Jenny Pigott*, so long as she remains sole and unmarried; and that the said Appellants, as Heirs at Law as well of the said *John Walker*, the Father of the said Testator, *John Walker Heneage*, as of the said Testator, *J. W. Heneage*, are entitled to the said Real and Personal Estates of the said Testator, *J. W. Heneage*, subject to the Provision so made by the said Will of the said Testatrix, *Arabella Walker Heneage*, for the said *A. A. C. Jenny Pigott* as aforesaid; for the following amongst other reasons:

1. Because the said Testator, *J. W. Heneage*, by his said Will, imposed a Trust upon his said Wife, the said Testatrix, *Arabella Walker Heneage*, (after making a suitable Provision out of his Real Estate for the said *A. A. C. J. Pigott*, for her life, in manner mentioned in the said Will,) to devise and bequeath the whole of his Real and Personal Estate, together and entire, to one of the Heirs of his late Father, *John Walker*, giving her power only to select such one of the Heirs of his the said Testator's said Father as she might think best deserved her preference. And because the Property which was the

subject of the Trust was certain, viz. the Real and Personal Estate of the Testator together and entire, subject to such Income out of the Testator's Real Estate as his said Wife should secure to the said *A. A. C. J. Pigott*, for her life, in the manner mentioned in his said Will. And because the Persons in whose favour the Trust was imposed, were certain, viz. the Heirs of the said Testator's Father, *John Walker*, to one of whom the said Testator's Wife (after making a suitable Provision out of the Testator's Real Estate for the said *A. A. C. J. Pigott*, for her life, as aforesaid) was to devise and bequeath the said Testator's Real and Personal Estate together and entire. It is to be observed that, at the time the said Testator made his said Will, he had two Sisters living, who, in case of his death, would be the Heirs of his said Father, and both of whom having Issue living at the time, the probability was that the said Testator's Wife would have a power of selection amongst the Heirs of the said Testator's Father, and which in fact happened, there having been two Heirs of the Testator's Father living, as well at the respective times of the Testator's making his Will, (setting himself out of the question) and of his death, as at the respective times of the said Testatrix making her said Will and Codicils, and of her death."

2. "Because the word "Heirs" in the Clause in question in the said Testator's Will, must be construed in its plain and usual acceptation, as meaning the very Heirs of the said Testator's said Father at the time of the said Testatrix making her selection and death, that being the meaning of the word "Heirs" whenever it is used as a designation of the Person or Persons to take, and there being nothing in this case to call for a depar-

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ture from such meaning of the word. And because the meaning which the said Respondents, the Plaintiffs in the said Cause, put upon it, viz. all the Heirs of the said Testator's Father present and to come, proximate and remote, so as to admit of the said Testatrix selecting any Descendants of the said Testator's Father, though not one of the very Heirs, to whom to give his Real and Personal Estate, is strained, unnatural, and unwarranted by any decided Case."

3. "Because, supposing the power, given by the said Testator to the said Testatrix, to have enabled her to devise and bequeath his Real and Personal Estate to any Descendant of the said Testator's said Father, though not one of the very Heirs, yet she has not well executed the power, inasmuch as she has not, after making Provision for the said *A. A. C. J. Pigott*, for her Life, as mentioned in the Case, given the said Testator's Real and Personal Estate, together and entire, to one of such Descendants whom she might think best deserved her preference, but has given certain Articles of the said Testator's Personal Estate, which remained in her hands, *in Specie*, to Persons entirely strangers in blood to the said Testator's said Father; and, after making Provision for the said *A. A. C. J. Pigott*, for her Life, as mentioned in the Case, has devised the said Testator's general Real Estate to divers of the Descendants of the said Testator's said Father, for limited Estates and Interests, in succession, in strict Settlement, and has made certain Provisions, out of such Real Estate, for Persons entirely strangers in blood to the said Testator's said Father, and for purposes not authorized by the said Testator's Will, besides having sold and disposed of certain parts of such Real Estate in her Lifetime."

The Appeal having been heard, The *Lord Chancellor* (e) said that it would be difficult to say that the Devise to the Testator's Widow created a Condition, as there was a degree of uncertainty who was to take advantage of a breach of the Condition; that the only question was whether it created a Trust: that, if a confidence was reposed in the Devisee, but it appeared that the Testator did not mean absolutely to control the Will of his Devisee, though the subject and object of the intended Provision were both certain, no Trust would be created: That it was impossible for a Testator to express recommendation and entreaty more strongly than he had done with regard to Miss *Pigott*, and that the words used, for that purpose, were quite sufficient to create a Trust, if the other expressions in the same part of the Will had been sufficient for that purpose: That there was a certainty as to the person, but not as to the quantity of property to be given to her, which was left in the Wife's discretion: That the Testator, though he intended to impose a moral obligation on his Wife, could not mean to impose a legal one upon her, or else he would not have used the terms "unlimited and unfettered," or have designated the Property he had left her as very considerable, because, if he intended her to have a Life Interest only in it, her enjoyment might have been very momentary: That there was very considerable difficulty in saying who were the Persons who were described as the Heirs of the Testator's Father, and in reconciling, the direction that the Property should go altogether and entire, with the wish expressed, by the Testator, that his Wife should not only make a disposition, but a distri-

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bution of it: that the Cases of *Brown v. Higgs* (f), and *Harding v. Glyn* (g), which had been relied on for the Appellants, did not govern this Case: and that this was not a Case in which the Testator meant to impose that obligation which would convert the Testatrix into a Trustee: and that, therefore, the Decision of the Court of Exchequer was right.

Lord Redesdale said that all cases of this description, were to be considered with very considerable strictness, as it was a very inconvenient mode of disposition: That the Appellants could not claim under the will, but must claim against it, either because a condition had been broken, or a trust not duly executed: That, in all the Cases that had been referred to, there were persons who were defined to be objects of the Trust; and, if the Trust was not executed by the Trustee, the Court took upon itself to execute it according to what it conceived to be the intent of the Testator: That that could not be done here, as the estate could not be conveyed, to the two Appellants, entire: That a condition was not created, as the Testator declared that he had given his property, to his wife, "unfettered and unlimited;" and that his Lordship perfectly agreed with the decision of the Court of Exchequer (h).

Ordered and adjudged that the Appeal be dismissed, and the Decree complained of affirmed.

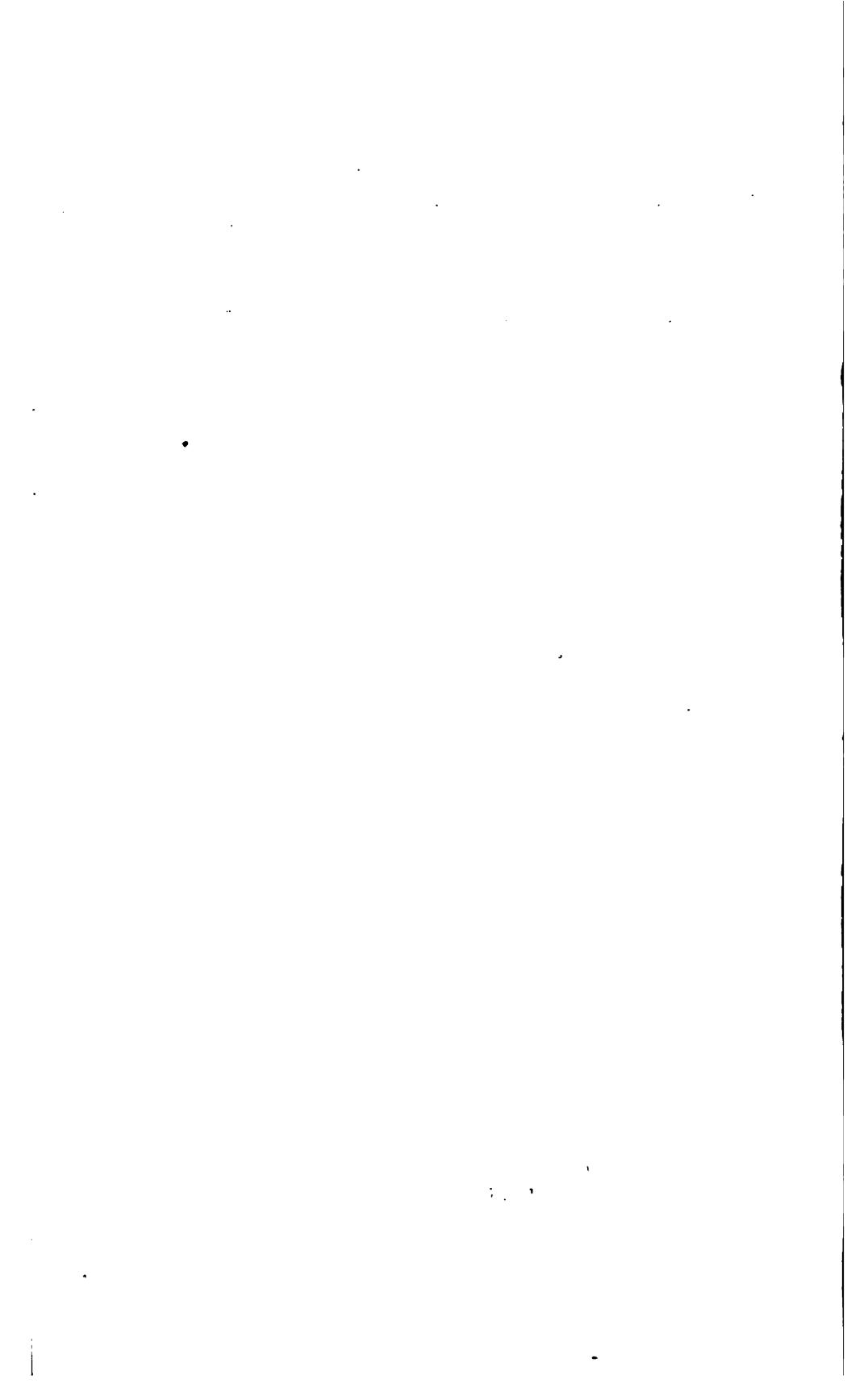
(f) 8 Ves. 561. (g) 1 Atk. 469.

(h) The above report of the opinions delivered by Lords Eldon and Redesdale, was extracted from the notes of a short-hand writer, with which Mr. PRESTON kindly furnished the Reporter.

The Appellants' case was signed by Mr. *Heald*, Mr. *Shadwell*, Mr. *Sugden* and Mr. *Boteler*; and the three cases for the Respondents, by Sir *Charles Wetherell*, S. G., Mr. *Roupell* and Mr. *Preston*, Mr. *Horne* and Mr. *Lynch*, and Mr. *Wray* and Mr. *Coote*.

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I N D E X

TO THE

P R I N C I P A L M A T T E R S.

ACCOUNT.

Where the usual decree for accounts against a personal representative, has been taken upon motion, the Master ought to require the vouchers to be produced, although the answer is not replied to. [*Davenport v. Davenport*] - - - 512

AFFIDAVIT.

No affidavit is necessary to support a motion, by a plaintiff in an interpleading suit, for liberty to pay the money into court, and for an injunction. [*Walbanke v. Sparks*] 385

AGREEMENT.

1. A partner, who superintended, exclusively, the accounts of the concern, agreed to purchase his co-partner's share of the business, for a sum, which he knew, from accounts in his possession, but which he concealed from his co-partner, was an inadequate consideration: the agreement was set aside. [*Maddeford v. Austwick. Austwick v. Maddeford*] - - 89
2. An agreement will not be avoided by reason that representations, made

by one party to the other upon the subject of the agreement, are not correct, if it be manifest that the party making the representations is speaking, not from personal knowledge, but with reference to accounts which were equally open to both parties, and if the representations be justified by those accounts. [*Harris v. Kemble.*] 111

See CARRIER.—MISREPRESENTATION.—PARENT AND CHILD.

ALIEN.

See FOREIGN STATES.

AMENDMENT.

A bill may be amended by adding plaintiffs, notwithstanding the defendants have answered it. [*Hitchens v. Congreve*] - - - 500

See DEPOSITIONS.—PRACTICE, 1, 2, 8.

ANNUITY.

1. An annuity given to A. for his personal support, not to be liable to his debts, and to be paid from

time to time into his proper hands, and not to any other person, and his receipt only to be a sufficient discharge, passes, on A.'s bankruptcy, to his assignees. [*Graves v. Dolphin*] - - - - - 66

2. An assignment of 150*l.*, part of the dividends of a sum of stock to which the vendor was entitled for life, with a proviso that the purchaser should not receive any part of the dividends then growing due, but a proportionable part of the 150*l.*, is a grant of an annuity to that amount, and must be memorialized. [*Charrette v. Vause*] 153

See CONSIDERATION.

ANSWER.

1. Exceptions to an answer having been allowed, plaintiff obtained an order to amend and for defendant to answer the exceptions and amendments at the same time; defendant put in an answer to the amended bill only; the plaintiff then issued an attachment. Held that it was irregular, and that plaintiff ought to have moved to take the second answer off the file. [*De Tastet v. Lopez*] - - - - - 11

2. A broker in the City of London must answer a bill of discovery in aid of an action brought against him by his employer, for misconduct; although the discovery will subject him to the penalties of bond, given by him, to the corporation, on his admission. [*Green v. Weaver*] - - - - - 404

3. Leave given to file a supplemental answer to a bill for dower, in order to state a fine and nonclaim, omitted, through ignorance, in the original answer. [*Jackson v. Parish*] - - - - - 505

See PRACTICE, 8. 11. 13.

APPLICATION OF PAYMENTS.

A. the widow and administratrix of B., continues B.'s trade after his decease. B. at his death, was indebted to C. on balance of account. A. continues to receive goods from, and to make payments to C., as B. had done, and she is charged, in account, by C. with the debt. The payments made by her to C. exceed the debt; but a balance is ultimately due to C. Held that A.'s debt was discharged by B.'s payments; and that the ultimate balance can not be proved against B.'s estate. [*Sterndale v. Hankinson*] - - - - - 393

ARBITRATION.

Although a reference to arbitration is made an order of the court, either party may revoke the authority of the arbitrator before the award is made; but it is a high contempt so to do. [*Haggett v. Welsh*] 134

ASSETS.

1. Testator gave his real and personal estate to persons, whom he afterwards appointed his executors, in trust, in the first place, to sell an advowson, and apply the pro-

ceeds in discharge of his debts and legacies, and, if they should be insufficient, then to raise, the deficiency, by sale or mortgage of his real estates, and directed his executors to retain their expenses, but did not expressly declare any trust as to his personal estate. Held that the personal estate was primarily applicable to the payment of testator's debts. *[Rhodes v. Rudge]* - - - - - 79

2. A judgment, obtained in the Lord Mayor's court, against the garnishee, will not entitle the plaintiff to rank as a judgment-creditor in the administration of the garnishee's assets. *[Holt v. Murray]* - 485
See EXECUTOR, 1.—WIDOW.

ASSIGNEES.
See ANNUITY, 1.—PARTIES, 3.

ASSURANCE.
See POLICY OF ASSURANCE.

ATTACHMENT.

1. Exceptions to an answer having been allowed plaintiff obtained an order to amend and for defendant to answer the exceptions and amendments at the same time; defendant put in an answer to the amended bill only: the plaintiff then issued an attachment. Held that it was irregular, and that plaintiff ought to have moved to take the second answer off the file. *[De Tastet v. Lopen]* - - - 11
2. An order for time to answer, unless drawn up and served, will not stop an attachment. *[Gayler v. Fitzjohn]* - - - - - 386
3. Attachment granted for non-appearance to a subpoena served abroad. *[Nichol v. Gwyn]* - 389

ATTACHMENT (FOREIGN.)
A judgment, in the Lord Mayor's court, obtained against the garnishee, does not entitle the plaintiff to rank as a judgment-creditor in the administration of the garnishee's assets. *[Holt v. Murray]* 485

ATTORNEY-GENERAL.
A few of a large number of persons may institute a suit on behalf of themselves and the rest, for relief against acts injurious to their common right, although the majority approve of those acts, and disapprove of the institution of the suit: and the Attorney-General need not be a party to it. But where the whole body concur in an abuse, the suit must be instituted by the Attorney-General. *[Bromley v. Smith]* 8

BANKRUPT.
1. An annuity given to A. for his personal support, not to be liable to his debts, and to be paid from time to time into his proper hands, and not to any other person, and his receipt only to be a sufficient discharge, passes, on A.'s bankruptcy, to his assignees. *[Graves v. Dolphin]* - - - - - 66

2. A., the widow and administratrix of B., continues B.'s trade after his decease. B., at his death, was in-

debted to C., on balance of accounts, A. continues to receive goods from, and to make payments to C. as B. had done, and she is charged, in account, by C. with the debt. The payments made by her to C. exceed the debt, but a balance is ultimately due to C. Held that A.'s debt was discharged by B.'s payments, and that the ultimate balance cannot be proved against B.'s estate [*Sterndale v. Hankinson*] - - - - - 393

See COMMISSION OF BANKRUPT.—INJUNCTION, 2.—EQUITY, 2.—PRACTICE, 11 & 21.

BARON AND FEME.

See DEBTOR AND CREDITOR.—FEME COVETTE.—SPECIALTY CREDITOR, 1.

BILL (RESTORING OF).

See PRACTICE, 19.

BONUS.

See POLICY OF ASSURANCE, 1.

BROKER.

A broker in the city of London must answer a bill of discovery in aid of an action brought against him, by his employer, for misconduct; although the discovery will subject him to the penalty of a bond given by him to the corporation on his admission. [*Green v. Weaver*] 404

BUBBLE.

See EQUITY, 3.

CARRIER.

A. B. & c. were common carriers from L. to F., a separate portion of the road being allotted to each, and it having been stipulated, also, that no partnership should exist between them. A., for himself and the other parties, agrees, with the Mint, to carry coin from L to F., and afterwards makes another agreement, with the Mint, to carry other coin to places not on the road: Held that all the parties were entitled to share in the profits of this agreement. [*Russell v. Austwick*]

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CERTIFICATE.

See MASTER'S CERTIFICATE.

CHARGES.

See MERGER.

CHARITY.

Where the trusts of a deed and will were to found a school, for the education of gentlemens' sons, in a particular house built by the founder; and it was provided that, if the school were not established, the funds should be applied, at the discretion of the trustees, to some other purpose conducing to the good of the county of Westmorland, and the parish of Lowther especially; the charity, as to the school, having altogether failed, by the school-house having been built on a part of the founder's family estate, of which he was tenant for life only, the Court referred it to

the Master to settle a scheme for the benefit of the county of W. and the parish of L. especially. [*The Attorney-General v. The Earl of Lonsdale*] - - - 105

COMMISSION OF BANKRUPT.

No objection can be taken, at the hearing of a cause, to the validity of a commission of bankrupt, unless the requisite notice be given, although the objection appears upon the proceedings, and requires no evidence to support it. [*Bevan v. Lewis. Stokes v. Whitaker*] 376

COMMISSION OF PARTITION.

See PARTITION.

COMMISSION TO EXAMINE WITNESSES.

See LACHES—PLEA.

CONSIDERATION.

A grant of an annuity to the grantor's sister, though expressed to be made for natural love and affection, may be proved to have been made in consideration of her marriage, and will entitle her to rank as a specialty creditor of the grantor. [*Tunner v. Byne*] - - - 160

CONSTRUCTION.

1. Tenant for life unimpeachable of waste, except in the park, demesne lands, and woods adjoining the capital messuage, there being no woods of that description, cannot cut timber in any of the woods that are either an ornament or shelter to the messuage. [*Newdigate v. Newdigate*] - - - 131

2. A policy of insurance, for 3,000*l.*, on A.'s life, was assigned to trustees, and, by a deed of even date, trusts were declared of it, by the description of: "The sum of 3,000*l.*, for which A.'s life was insured," and power was given to B. to dispose of it by will. B., after reciting the settlement, bequeathed 1,000*l.*, part of the sum of 3,000*l.*, to A., and the remaining sum of 2,000*l.*, to C. At A.'s death 9,000*l.* were received under the policy: Held that the whole fruits of the policy were subject to the trusts of the settlement, and passed, by the bequests, to A. and C., in proportion to their legacies. [*Courtney v. Ferrers*] 137

3. The word "hereinafter" construed "herein." [*Bengough v. Edridge*] 173

4. A feme covert having power to dispose, by will, of personal property, and of a real estate at N., by her will, after reciting the power, gave several pecuniary legacies, and then gave, to her husband, her fields and house at N., likewise the remainder of her personality, and all she might die possessed of after payment of her debts, legacies, and funeral and testamentary expenses: Held that the husband took a life-estate only in the realty, notwithstanding the gift to him of all the testatrix might die possessed of. [*Monk v. Mawdsley*] - - - - - 286

5. A testator gave all his real and personal estate to trustees in trust, as to one moiety, for A. for life,

with remainder to her children, and, as to the other moiety, for B. and her children, in like manner. By a codicil, he declared that his estates should not be divided equally between A. and B., but in proportion to the number of their children; and he left A. and B. jointly, his residuary legatees. By another codicil, in order to prevent disputes, he gave one of his estates to A. and her heirs, and the other to B. and her heirs, the number of their children nearly equalizing the value of the two estates. In a subsequent codicil he mentioned that he had bequeathed the first estate to A. and her children, and the second to B. and her children: Held that A. and B. were entitled to these estates for their lives only, with remainders to their children, and that they were not entitled to the personal estate absolutely, but for their lives only, with remainders to their children, and in shares proportioned to the number of their children. [*Lushington v. Sewell*]

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6. A testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of the legatee. A debt, though usurious, must be deducted from the legatee's share. [*Stanton v. Knight* - - - 482

7. Trust, created by will, to purchase land, to be added and closely entailed to a testator's family estate in possession of T. B.; testator declaring that his object

was to have a head to the family; and that, if T. B. should die without male issue, or dispose of the family estate, the residue of his fortune should go to A. B. or his nearest relative in the male line; how to be executed. [*Woolmore v. Burrows*] - - - - 512

8. Testator having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her and not doubting that she would consider his near relations, as he would have done if he had survived her. Held that there is no trust for the next of kin, but that the wife takes the residue absolutely. [*Sale v. Moore*]

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9. Testator, after giving his real and personal estates to his wife in fee, said that he had given the same to her unfettered and unlimited, in full confidence that, in her future disposition thereof, she would distinguish the heirs of his late father, by devising the whole of his estate together and entire to such of his father's heirs as she might think best deserved her preference. Held that no trust was created. [*Meredith v. Heneage*] - - 542

See CUSTOM OF LONDON.—POWER.—WEST INDIA ESTATE.

CONSTRUCTION OF ORDER.

A party ordered to produce books, &c. before the Master, is bound to

leave them, if the Master thinks fit so to direct. [*Sidden v. Lid-diard*] - - - - - 388

CONTEMPT.

Although a reference to arbitration is made under an order of the court, either party may revoke the authority of the arbitrator before the award is made; but it is a high contempt so to do. [*Hagget v. Welsh*] - - - - - 134

CONVERSION.

Testatrix gave her real and personal estate to trustees, to sell, and directed that the proceeds of her real estate should be taken as part of her personal estate, that out of the monies to arise by such sale, and out of all other her personal estate, her legacies should be paid, and gave the residue to A. for life, with remainder over: Held that the real estate was absolutely converted into personalty, and that some of the legacies, which had lapsed, belonged to the residuary legatee, and not to the heir. The legacies not having been paid within a year after testatrix's death, A. is not entitled to that year's income, but it forms part of the capital of the residue. [*Amphlett v. Parke*] - - - - - 275

COSTS.

A plaintiff resident abroad, who had been ordered to give security for costs, but had not complied, order-

ed to give the security, and on default his bill to be dismissed. [*Camac v. Grant*] - - - - 348

CUSTOM OF LONDON.

The personal estate of an honorary freeman of the city of London, is, in case of his dying intestate, distributable according to the custom of London, and his widow is not barred of her customary share by a settlement which is expressed to be in lieu of all dower, or thirds, or other portion at common law, or otherwise, out of his freehold and copyhold lands. [*Onslow v. Onslow*] - - - - - 18

DEBTOR AND CREDITOR.

1. The wife of a bankrupt, having separate property, died in France, in possession of other property there, which was claimed, by the creditors, as belonging to the husband. She, by will, disposed of all her separate estate, except 1,500*l.* consols (which, in default of appointment, was held in trust for her executors or administrators), and appointed a lady, resident in France, her executrix. Injunction granted, at the suit of the assignees, to restrain the transfer of the consols; but refused as to the rest of the separate estate. [*Stead v. Clay*] - - - - 294
2. A. the widow and administratrix of B. continues B.'s trade after his decease. B., at his death, was indebted to C. on balance of account; A. continues to receive goods from

and to make payments to C. as B. had done, and she is charged, in account, by C. with the debt. The payments made by her to C. exceed the debt: but a balance is ultimately due to C. Held that A.'s debt was discharged by B.'s payments, and that the ultimate balance cannot be proved against B.'s Estate. [*Sterndale v. Hankinson*] - - - - - 393

DEFENDANT.

A broker in the City of London must answer a bill of discovery in aid of an action, brought against him, by his employer, for misconduct, although the discovery will subject him to the penalties of a bond given by him to the corporation on his admission. [*Green v. Weaver*]

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See PRACTICE, 11.

DELAY.

See LACHES.

DEMURRER.

1. A speaking demurrer is where a new fact is introduced which is necessary to support the demurrer. [*Davies v. Williams*] - - - 5
2. The eight days within which a demurrer must be entered with the registrar, are eight office-days. [*Bullock v. Edington*] - - - 481
3. A bill in Equity does not lie by the assignees of a bankrupt against a judgment-creditor and the sheriff, for monies levied under an exe-

cution upon a judgment by *nil dicit*. [*Mitchell v. Knott*] - 497

See EQUITY.—JURISDICTION.—PLEADING, 1.

DEPOSITIONS.

1. Office-copies of depositions by living persons, in a tithe-suit in the Exchequer, may be read, in a similar suit in this court, against another defendant who makes the same defence, on production of office-copies of the bill and answer in the former suit, without any order of this court for that purpose. [*Williams v. Broadhead*] - 151
2. Depositions taken, after decree, by Commission, or by the Examiner, are published by order of court; and those taken before the Master, by his warrant. [*Handley v. Billing*] - - - - - 511
3. If a bill is amended by adding parties after witnesses have been examined, their depositions can not be read against the new parties. [*Pratt v. Barker; Pretty v. Barker*] 1

DEVISE.

1. A testator makes a general devise of all his lands in nine parishes: in five of them, he had only lands in fee; in three others, he had only lands over which he had a power of appointment; in the other, he had lands in fee, and also lands over which his power extended. All the lands pass by his will except the lands in the latter parish, which were subject to his power. [*Napier v. Napier*] - - - 28

2. Trusts to be performed after the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons, who were living at the testator's decease, are valid. [*Bengough v. Edridge*] - - - - - 173

See WEST INDIA ESTATE.

DISCOVERY.

See ANSWER, 2.—PLEA.

DISMISSAL.

Where there are two plaintiffs, and one of them only becomes bankrupt, the bill may be dismissed upon the usual motion. [*Caddick v. Masson*] - - - - - 501

DIVIDENDS, (SALE OF.)

An assignment of 150*l.*, part of the dividends of a sum of stock to which the vendor was entitled for life, with a proviso that the purchaser should not receive any part of the dividends then growing due, but a proportionable part of the 150*l.* is a grant of an annuity to that amount, and must be memorialized. [*Charrette v. Vause*] 153

DOCUMENTS.

See CONSTRUCTION OF ORDER.

DOWER.

See WIDOW.

ELECTION.

To raise a case of election there must be a form of gift as to the

property which the donor had no power to dispose of. [*The Attorney-General v. The Earl of Lonsdale*] - - - - - 105

EQUITY.

1. A tenant has no equity to compel his landlord to expend money, received from an insurance office, on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt. [*Leeds v. Cheetaham*] - - - - - 146

2. A bill in equity does not lie, by the assignees of a bankrupt, against a judgment-creditor and the sheriff, for monies levied under an execution upon a judgment by *nil dicit*. [*Mitchell v. Knott*] - 497

3. A bill in equity lies to recover deposits paid by a shareholder in a joint-stock company where the project is a bubble. [*Green v. Barrett*] - - - - - 45

See PARENT AND CHILD.

EVIDENCE.

1. If a bill is amended by adding parties, after witnesses have been examined, their depositions cannot be read against the new parties. [*Pratt v. Barker. Pretty v. Barker*] - - - - - 1

2. Office-copies of depositions by living persons in a tithe-suit in the Exchequer, may be read in a similar suit in this court, against another defendant who makes the same defence, on production of the

office-copies of the bill and answer in the former suit, without any order of this court for that purpose. [Williams v. Broadhead]

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3. A tenant for life of an estate settled in strict settlement, buys up some of the charges on the estate, and has them assigned to a trustee: he next purchases the ultimate remainder, and has it conveyed to him, subject to the subsisting charges: he then devises the estate, subject to the charges that might be thereon at his decease: the intermediate remainders fail at his death. The charges so purchased are merged; and parol evidence is admissible to prove that the testator so intended. [Astley v. Milles.] - - - 298

See SPECIALTY CREDITOR, 2.

EXCEPTIONS.

1. An exception may be regularly filed to the Master's report as to impertinence, after the order to expunge, and at any time before the impertinent matter is actually expunged. [David v. Williams] 17

2. Exceptions will not lie to the return of commissioners in a suit for partition, on the ground of inequality of value in the lots. In all cases of improper conduct in the commissioners a motion must be made to suppress the return. [Jones v. Totty] - - - 136

3. A Master's certificate as to production of books, &c. cannot be

excepted to; a motion must be made to quash it. [Jones v. Powell]

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4. Exceptions to an answer filed after the bill has been amended, will not be taken off the file if no answer is required to the amendments. [Miller v. Wheatley]

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5. If a general exception is taken to a Master's report, and the Court is of opinion that the Master is right in any one particular, the exception must be over-ruled. [Green v. Weaver] - - - 404

EXECUTOR.

An executor in India is entitled to a commission of 5 per cent. on all assets of a testator collected by him there, including the assets which he retains in respect of a legacy to himself, not given to him in the character of executor, and including monies belonging to the testator which were in the hands of a commercial house in which the executor was, and the testator had been a partner. [Cockerell v. Barber] - - - - - 23

See PARTIES, 1.—PRACTICE, 22 & 25.—WILL. 1.

FEME COVERTE.

The husband of a woman entitled to a fund in a cause, signed, after the marriage, a written agreement that he would settle half the wife's fortune upon her: Held that the agreement enured to the benefit

of the children of the marriage, and that therefore the wife could not wave it. [Fenner v. Taylor] 169

See INJUNCTION, 2.—POWER, 2.

FINE.

A fine and non-claim cannot be pleaded in bar to a bill to prevent the setting up of an outstanding term. [Leigh v. Leigh] - 349

FOREIGN ATTACHMENT.

See ATTACHMENT (FOREIGN).

FOREIGN STATES.

A foreign state may sue in this Court. But where a bill was filed by: "The government of the state of Colombia and Don M. J. Hurtado, a citizen of that State, and minister plenipotentiary from the same to the court of His Britannic Majesty, and now residing at 33, Baker-street, Portman-square, in the county of Middlesex" a general demurrer was allowed to the bill, because the description of the plaintiffs did not enable the defendants to know upon whom process was to be served in case a cross-bill were filed. *The Colombian Government v. Rothschild*] - - - - 94

FRAUD.

1. The Court refused to set aside a voluntary deed, executed by an old and infirm man, in favour of a person who attended him as a surgeon, and received the dividends of some

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stock for him. It appearing that the nature and effect of the deed were fully explained, to the grantor, by his solicitor, before he executed it, and that no undue influence had been exercised over him. [Pratt v. Barker, Pretty v. Barker] - 1

2. The shareholders in a joint-stock company are entitled to relief in equity, where the conduct of the directors has been fraudulent, or a violation of the terms on which the company was formed. [Blain v. Agar] - - - - - 37
3. A bill in equity lies to recover deposits, paid by a shareholder in a joint-stock company, where the project is a bubble. [Green v. Barrett] - - - - - 45
4. A partner, who superintended, exclusively, the accounts of the concern, agreed to purchase his co-partner's share of the business for a sum, which he knew, from accounts in his possession, but which he concealed from his co-partner, was an inadequate consideration. The agreement was set aside. [Maddeford v. Austwick, Austwick v. Maddeford] - - - - - 89

FREEMAN OF LONDON.

See WIDOW.

HABEAS CORPUS.

See PRACTICE, 15.

HEIR AND EXECUTOR.

If an Estate descends subject to a mortgage, and the heir creates a new mortgage for securing the old

debt; and also one contracted by himself, and fixes a new day of payment, he makes himself liable to both debts, notwithstanding he exempts, in the new security, his person and property, except what is comprised in the new mortgage, from liability in respect of the Debts. [*Lushington v. Scwell*] 435

See CONVERSION.—PRACTICE, 22.—WILL, 1.

IMPERTINENCE.

See PRACTICE, 4.

INFANT.

A suit being instituted, on behalf of infants, by a solicitor wholly unconnected with the family, it was, on the motion of the defendant, referred to the Master to inquire whether it would be for the infants' benefit that the suit should be prosecuted, the defendant undertaking to render to the Master the accounts prayed for by the bill. [*Richardson v. Miller*] - - - - - 133

See PRACTICE, 17.

INFLUENCE (UNDUE).

See FRAUD, 1.

INJUNCTION.

1. The plaintiff in a bill of interpleader may move, at once, for a special injunction, on payment of the money into court, without first obtaining the common injunction. [*Vicary v. Widger*] - - - 15

2. The wife of a bankrupt, having separate property, died in France, in possession of other property there, which was claimed by the creditors, as belonging to the husband. She, by will, disposed of all her separate estate, except 1,500*l.* consols, (which, in default of appointment, was held in trust for her executors or administrators), and appointed a lady, resident in France, her executrix. Injunction granted, at the suit of the assignees, to restrain the transfer of the consols, but refused as to the rest of the separate estate. [*Stead v. Clay*] - - - - - 294

3. Injunction granted to restrain the disclosure of secrets come to the defendant's knowledge in the course of a confidential employment. [*Evitt v. Price*] - - - - - 483

4. Motion to extend common injunction granted, where the answer, which was filed on the same morning, was insufficient, and the trial was coming on the next day but one. [*Munning v. Adamson*] 510

See EQUITY, 1.—INTERPLEADER.

INTEREST.

The amount of deterioration of an estate pending a suit for specific performance having been ascertained, by an issue, the purchaser was allowed it out of his purchase-money which he had paid into Court under an order, with interest from the time when he paid in his money [*Ferguson v. Tadman. Ruck v. Tadman*] - - - 530

See CONVERSION.

INTERPLEADER.

No affidavit is necessary to support a motion by a plaintiff in an interpleading suit for liberty to pay the money into Court, and for an Injunction. [Walbanke v. Sparks]

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See INJUNCTION, 1.

JOINT STOCK COMPANY.

1. The shareholders in a joint-stock company are entitled to relief in equity where the conduct of the directors has been fraudulent, or a violation of the terms on which the company was formed. [Blain v. Agar] - - - - - 37

2. A bill in equity lies to recover deposits paid by a shareholder in a joint-stock company, where the project is a bubble. [Green v. Barrett] - - - - - 45

JUDGMENT DEBT.

A judgment in the Lord Mayor's Court, obtained against the garnishee, does not entitle the plaintiff to rank as a judgment-creditor in the administration of the garnishee's assets. [Holt v. Marry] 485

See EQUITY, 2.

JURISDICTION.

A foreign state may sue in this Court. But where a bill was filed by "The Government of the State of Colombia and Don M. J. Hurtado, a citizen of that state, and

minister plenipotentiary from the same to the court of His Britannic Majesty, and now residing at 33, Baker-street, Portman-square, in the county of Middlesex," a general demurrer was allowed to the bill, because the description of the plaintiffs did not enable the defendants to know upon whom process was to be served in case a cross-bill were filed. [The Colombian Government v. Rothschild]

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LACHES.

The original bill being for an account and an injunction to restrain an action, and the injunction having been dissolved on the merits, nearly ten years after the bill was filed, the plaintiff filed a supplemental bill, for a discovery and commission to examine witnesses in aid of his defence to an action substantially the same: Motion for the commission refused, with costs, on the ground of delay. [Todd v. Aytwyn] - - - 271

LANDLORD AND TENANT.

A tenant has no equity to compel his landlord to expend money received from an insurance office on the demised premises being burnt down, in rebuilding the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt. [Leeds v. Cheetah] 146

LEGACY.

See WILL, 3.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

MASTER'S CERTIFICATE.

The Master's certificate, as to production of books, &c. by a party, can not be excepted to; a motion must be made to quash it. [Jones Powell] - - - - - 387

MERGER OF CHARGES.

A tenant for life of an estate settled in strict settlement, buys up some of the charges on the estate, and has them assigned to a trustee: he next purchases the ultimate remainder, and has it conveyed to him subject to the subsisting charges: he then devises the estate, subject to the charges that might be thereon at his decease: the intermediate remainders fail at his death. The charges so purchased are merged; and parol evidence is admissible to prove that the testator so intended. [Astley v. Milles and others] - - 298

MISREPRESENTATION.

1. A piece of land imperfectly watered was described, in the particular, as uncommonly rich water-meadow: Held that this was not such a misrepresentation as would avoid the sale. [Scott v. Hanson] 13
2. If A. in contracting with B. falsely represents himself to be the agent of C., and thereby obtains better terms, the Court will, notwithstanding, enforce the contract, un-

less A. knew that such would be the effect of the misrepresentation. [Followes v. Lord Gwydyr] - - 63

See AGREEMENT, 2.

MORTGAGE.

See HEIR AND EXECUTOR.

NEXT FRIEND.

A suit being instituted on behalf of infants, by a solicitor wholly unconnected with the family, it was on the motion of the defendant referred to the Master to inquire whether it would be for the infants' benefit that the suit should be prosecuted, the defendant undertaking to render to the Master the accounts prayed for by the bill. [Richardson v. Miller] - - 133

See PRACTICE, 17.

ORDER.

See ATTACHMENT—CONSTRUCTION.

OUTSTANDING TERMS.

See FINE.—PLEADING, 3, 4.

PARENT AND CHILD.

The husband of a woman entitled to a fund in a cause, signed, after the marriage, a written agreement that he would settle half the wife's fortune upon her: Held that the agreement enured to the benefit of the children of the marriage, and that therefore the wife could not waive it. [Fenner v. Taylor] 169

PARTIES.

1. Where one executor has alone proved, he may sue without making

the other executors parties, although they have not renounced. [*Davies v. Williams*] - - - 5

2. A few of a large number of persons may institute a suit, on behalf of themselves and the rest, for relief against acts injurious to their common right, although the majority approve of those acts, and disapprove of the institution of the suit; and the Attorney-General need not be a party to it; but, where the whole body concur in an abuse, the suit must be instituted by the Attorney-General. [*Bromley v. Smith*] - - - - - 8

3. If several shareholders assign, by deed, their deposits to others, and appoint the latter their attorneys for recovering their deposits, the assignees cannot sue on behalf of themselves and their assignors; but the latter, however numerous, must be parties to the suit. [*Blain v. Agar*] - - - - - 37
See PLAINTIFF.

PARTITION.
 Exceptions will not lie to the return of commissioners in a suit for partition on the ground of inequality of value in the lots. In all cases of improper conduct of the commissioners, a motion must be made to suppress the return. [*Jones v. Totty*] - - - - - 136

PARTNERSHIP.
 1. A. B. &c. were common carriers from L. to F., a separate portion of the road being allotted to each, and it having been stipulated also that no partnership should exist between them. A. for himself and the other parties, agrees, with the Mint, to carry coin from L. to F., and afterwards makes another agreement, with the Mint, to carry other coin to places not on the road: Held that all the parties were entitled to share in the profits of this agreement. [*Russell v. Austwick*] - - - - - 52

2. One of two solicitors, who were partners, became bankrupt; the assignees excluded the other from interfering with the affairs of the partnership: the Court, nevertheless, refused to order the assignees to deliver to him the papers belonging to the clients of the firm. [*Davidson v. Napier*] - - 297

3. If a partner borrows a sum of money and gives his own security only for it, it does not become a partnership debt by being applied for partnership purposes with the knowledge of the other partner. [*Bevan v. Lewis, Stokes v. Whitaker*] - - - - - 376
See AGREEMENT, 1.

PENALTIES.
See ANSWER, 2.

PERPETUITY.
 Trusts to be performed after the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons who were living at the testator's decease, are valid. [*Bengough v. Edridge*] - - - - - 173

PERSONAL ESTATE.

See ASSETS, 1.—HEIR AND EXECUTOR.—WILL, 1, 3.

PLAINTIFF.

A foreign state may sue in this Court; but where a bill was filed by: "The government of the State of Colombia, and Don M. J. Hurtado, a citizen of that state, and minister plenipotentiary from the same to the court of His Britannic Majesty, and now residing at 33, Baker-street, Portman-square, in the county of Middlesex," a general demurrer was allowed to the bill, because the description of the plaintiffs did not enable the defendants to know upon whom process was to be served in case a cross-bill were filed. [*The Colombian Government v. Rothschild*] 94

See COSTS.

PLEA.

1. A plea that the plaintiff has no interest in the subject of the suit, is a good plea to a bill for discovery and a commission. [*Mendizabel v. Machado*] - - - - 68
2. Treaties and conventions between foreign states may be pleaded to a bill for discovery and commission, where it appears from them that the plaintiff is not entitled to make the demand which he is seeking to substantiate - - - - ib.

PLEADING.

1. Where a plaintiff, by the present practice of the Court, may obtain relief by petition, for which

a supplemental bill was formerly necessary, and prefers the latter course, the supplemental bill is not demurable, but the proceeding will be taken into consideration on the question of costs. [*Davies v. Williams*] - - - - - 5

2. A few of a large number of persons may institute a suit on behalf of themselves and the rest, for relief against acts injurious to their common right, although the majority approve of those acts, and disapprove of the institution of the suit, and the Attorney-general need not be a party to it; but where the whole body concur in an abuse, the suit must be instituted by the Attorney-general. [*Bromley v. Smith*] - - - - - 8
3. A fine and nonclaim cannot be pleaded in bar to a bill to prevent the setting up of an outstanding term. [*Leigh v. Leigh*] - 349
4. The statute of limitations may be pleaded in bar to a bill to prevent the setting up of outstanding terms. [*Jeremy v. Best*] - - - - 373
5. A broker in the city of London must answer a bill of discovery in aid of an action brought against him by his employer for misconduct, although the discovery will subject him to the penalty of a bond given by him to the corporation on his admission. [*Green v. Weaver*] - - - - - 404

POLICY OF ASSURANCE.

A policy of insurance for 3,000*£* on A.'s life was assigned to trustees, and, by a deed of even date, trusts

were declared of it by the description of "the sum of 3,000*l.* for which A.'s life was insured," and power was given to B. to dispose of it by will. B., after reciting the settlement, bequeathed 1,000*l.*, part of the sum of 3,000*l.* to A., and the remaining sum of 2,000*l.* to C. At A.'s death 9,000*l.* was received under the policy: Held that the whole fruits of the policy were subject to the trusts of the settlement, and passed, by the bequests, to A. and C. in proportion to their legacies. [*Courtney v. Ferrers*] - - - - - 137

POWER.

1. A testator makes a general devise of all his lands in nine parishes: in five of them he had only lands in fee; in three others he had only lands over which he had a power of appointment; in the other he had lands in fee, and also lands over which his power extended: all the lands pass by his will except the lands in the latter parish, which were subject to his power. [*Napier v. Napier*] 28
2. A feme covert having power to dispose, by will, of personal property, and of a real estate at *N.*, by her will, after reciting the power, gave several pecuniary legacies, and then gave to her husband her fields and house at *N.*, likewise the remainder of her personality, and all she might die possessed of, after payment of her debts, legacies, and funeral and

testamentary expenses: Held that the husband took a life-estate only in the realty, notwithstanding the gift to him of all the testatrix might die possessed of. [*Monk v. Mawdsley*] - - - - - 286

PRACTICE.

1. If a bill is amended by adding parties after witnesses have been examined, their depositions cannot be read against the new parties. [*Pratt v. Barker. Pretty v. Barker*] - - - - - 1
2. Exceptions to an answer having been allowed, plaintiff obtained an order to amend, and for defendant to answer the exceptions and amendments at the same time: defendant put in an answer to the amended bill only. The plaintiff then issued an attachment: Held that it was irregular, and that plaintiff ought to have moved to take the second answer off the file. [*De Tastet v. Lopez*] - - - 11
3. The plaintiff in a bill of interpleader, may move, at once, for a special injunction, on payment of the money into court, without first obtaining the common injunction. [*Vicary v. Widger*] - - - 15
4. An exception may be regularly filed to the Master's report as to impertinence after the order to expunge, and at any time before the impertinent matter is actually expunged. [*David v. Williams*] 17
5. Exceptions will not lie to the return of commissioners in a suit for partition, on the ground of

inequality of value in the lots. In all cases of improper conduct in the commissioners a motion must be made to suppress the return. [Jones v. Totty] - 136

6. Office-copies of depositions, by living persons, in a tithe-suit in the Exchequer, may be read, in a similar suit in this court, against another defendant who makes the same defence, on production of office-copies of the bill and answer in the former suit, without any order of this Court for that purpose. [Williams v. Breadhead] 151

7. The vendor may confirm an order nisi obtained by the purchaser if the latter neglect to do so. [Chillingworth v. Chillingworth] - 291

8. Exceptions to an answer filed after the bill has been amended, will not be taken off the file if no answer is required to the amendments. [Miller v. Wheatley] 296

9. A plaintiff resident abroad, who had been ordered to give the security for costs, but had not complied, ordered to give the security, and on default his bill to be dismissed. [Camac v. Grant] - 348

10. A witness who had answered some of the interrogatories, but refused to answer the others, was ordered to answer those interrogatories within four days, or to stand committed. [Austin v. Prince] Ibid.

11. A defendant in a suit by the assignees of a bankrupt cannot object to the bill as not having been filed with the consent of the creditors, unless the objection is made by the answer. [Bevan v. Lewis. Stokes v. Whittaker] 376

12. No affidavit is necessary to support a motion by a plaintiff in an interpleading suit for liberty to pay the money into court, and for an injunction. [Walbanke v. Sparks] - - - - - 385

13. An order for time to answer, unless drawn up and served, will not stop an attachment. [Gayler v. Fitz-john] - - - - - 386

14. The Master's certificate, as to production of books, &c. by a party, cannot be excepted to, a motion must be made to quash it. [Jones v. Powell] - - - 387

15. Where a messenger has been sent upon a return of *cepi corpus*, and the defendant is in K. B. prison upon mesne process, a *habeas corpus* must next be obtained. [Neame v. Wagstaff] - - - - - 389

16. Attachment granted for non-appearance to a subpoena served abroad. [Nichol v. Gwyn] Ibid.

17. The court will remove a next friend, and appoint a new one where the former is so connected with a defendant, having an interest adverse to that of the infants, as to make it probable that their interest will not be properly protected by him. [Peyton v. Bond; Peyton v. Robinson] - - - - - 390

18. The eight days within which a demurrer must be entered with the registrar, are eight *office-days*. [Bullock v. Edington] - - 481

19. Bill restored, though the order to dismiss was not obtained till after a considerable interval since the last proceeding in the cause, and though the plaintiff had acquiesced in the order; the suit being one in which the main object was answered when an injunction was obtained. *[Bayfield v. Nicholson]* - - - - 494

20. A bill may be amended by adding plaintiffs, notwithstanding the defendants have answered it. *[Hichens v. Congreve]* - - 500

21. Where there are two plaintiffs, and one of them only becomes bankrupt, the bill may be dismissed upon the usual motion. *[Caddick v. Masson]* - - - - 501

22. If the executors of a purchaser under a decree refuse to pay the purchase-money, they cannot be compelled to pay it unless in a suit instituted by the heir. *[Lord v. Lord]* - - - - 503

23. Leave given, after replication, to file a supplemental answer to a bill for dower, in order to state a fine and non-claim omitted, through ignorance, in the original answer. *[Jackson v. Parish]* - - - 505

24. Motion to extend common injunction granted where the answer, which was filed on the same morning, was insufficient, and the trial was coming on the next day but one. *[Munnings v. Adamson]* 510

25. If an executor admits that all the testator's debts, &c. have been paid, the court will, on motion, order the income of a balance paid in by the executor, to be paid to the person entitled to the residue. *[Dando v. Dando]* - - - 510

26. Depositions taken after decree, under a commission, or by the examiner, are published by order of court; if before the Master, by his warrant. *[Handley v. Billing]* 511

27. Where the usual decree for accounts against a personal representative has been taken upon motion, the Master ought to require the vouchers to be produced, although the answer is not replied to. *[Davenport v. Davenport]* 512

PROCESS.

Where a messenger has been sent upon a return of *cepi corpus*, and the defendant is in K. B. prison upon meane process, a *habeas corpus* must next be obtained. *[Neame v. Wagstaff]* - - 389

PROCHEIN AMI.

The court will remove a next friend and appoint a new one, where the former is so connected with a defendant, having an interest adverse to that of the infants, as to make it probable that their interest will not be properly protected by him. *[Peyton v. Bond; Peyton v. Robinson]* - - - - - 390

See NEXT FRIEND.

PRODUCTION OF BOOKS, &c.

A party ordered to produce books, &c. before the Master is bound to leave

them, if the Master thinks fit so to direct. *Sudden v. Liddiard*] 388

RESIDUE.

If an executor admits that all the testator's debts, &c. have been paid, the court will, on motion, order the income of a balance, paid in by the executor, to be paid to the person entitled to the residue.

[*Dando v. Dando*] - - - 510

See CONVERSION.—WILL, 3. 8, 9.

RESTORING BILL.

Bill restored, though the order to dismiss was not obtained till after a considerable interval since the last proceeding in the cause, and though the plaintiff had acquiesced in the order; the suit being one in which the main object was answered when an injunction was obtained. [*Barfield v. Nicholson*] 494

SALE UNDER DECREE.

1. A. purchased for B., but without authority, an estate sold under a decree. B. died without adopting the purchase: the order *nisi* was, nevertheless, obtained: The court refused to order B.'s executors to pay the purchase-money; and, on the heir declining the purchase, discharged the order *nisi*, and directed a re-sale. [*Lord v. Lord*] 503
2. If the executors of a purchaser under a decree refuse to pay the purchase-money, they cannot be compelled to pay it, unless a suit be instituted by the heir. *Ibid.*

SALE OF DIVIDENDS.

See DIVIDENDS.

SETTLEMENT.

See PARENT AND CHILD.—SPECIALTY CREDITOR, 1, 2.

SHERIFF.

See EQUITY, 2.

SOLICITOR.

One of two solicitors, who were partners, became bankrupt; the assignees excluded the other from interfering with the affairs of the partnership: The Court nevertheless refused to order the assignees to deliver to him the papers belonging to the clients of the firm. [*Davidson v. Napier*] 297

SPECIALTY CREDITOR.

1. A husband made a post-nuptial settlement of 4,000*l.* in favour of his wife and children, and then, in consideration of the 4,000*l.* expressed to have been lent to him by the trustees of the settlement, made a mortgage to them of a real estate to secure that sum, and covenanted to repay it. The husband never, in fact, paid the 4,000*l.* to the trustees: Held, nevertheless, that they were specialty creditors of the husband. [*Tanner v. Byne*] 160
2. The grant of an annuity to the grantor's sister, though expressed to be made for natural love and affection, may be proved to have been made in consideration of her marriage, and will entitle

her to rank as a specialty creditor of the grantor. [*Tanner v. Ryne*] 160

SPECIFIC PERFORMANCE.

If A. is contracting with B. falsely represents himself to be the agent of C. and thereby obtains better terms, the Court will, notwithstanding, enforce the contract, unless A. knew that such would be the effect of the misrepresentation. [*Fellowes v. Lord Greyter*] 63

See MISREPRESENTATION.

STATUTE OF LIMITATIONS.

1. The statute of limitations may be pleaded in bar to a bill, or prevent the setting up of outstanding terms. [*Jeremy v. Best*] 373
2. A bill filed by one creditor on behalf of himself and the others, will prevent the statute of limitations from running against any of the creditors who come in under the decree. [*Sterndale v. Hankinson*] 393

SUPPLEMENTAL BILL.

Where a plaintiff, by the present practice of the Court, may obtain that relief by petition, for which a supplemental bill was formerly necessary, and prefers the latter course; the supplemental bill is not demurrable, but the proceeding will be taken into consideration on the question of costs. [*Davies v. Williams*] 5

See LACQUES.

SUPPLEMENTAL ANSWER.

Leave given, after replication, to file a supplemental answer to a bill for dower, in order to state a fine and nonclaim omitted, through ignorance, in the original answer. [*Jackson v. Parish*] 505

TENANT FOR LIFE.

A tenant for life of an estate settled in strict settlement, buys up some of the charges on the estate, and has them assigned to a trustee: he next purchases the ultimate remainder, and has it conveyed to him, subject to the subsisting charges: he then devises the estate, subject to the charges that might be thereon at his decease; the intermediate remainders fail at his death; the charges so purchased are merged; and parol evidence is admissible to prove that the testator so intended. [*Astley v. Milles*] 298

See CONVERSION.—MERGER OF CHARGES.—TIMBER.—WILL, 4.

TERMS.

See OUTSTANDING TERMS.

TIMBER.

Tenant for life, unimpeachable of waste, except in the park, demesne lands, and woods adjoining the capital messuage, there being no woods of that description, cannot cut timber in any of the woods that are either an ornament or shelter to the messuage. [*Newdigate v. Newdigate*] 131

TITHES.

An exemption from tithes was claimed, as to certain copyholds, on the ground of unity of possession of the rectory, manor and lands in one of the greater monasteries dissolved by 31 H. 8. Other copyholds of the manor had belonged to the monastery at the dissolution, and were subject to tithe: Held, nevertheless, that the exemption was good, because the monastery might have granted out the latter copyholds before the union of the rectory, and the former, after it. *[Monck v. Huskisson]* - - 280

See PRACTICE, 6.

TRUST.

- Execution of a trust, created by will, to purchase land to be added and closely entailed to testator's family estate, in possession of T. B. testator declaring that his object was to have a head to the family, and that if T. B. should die without male issue, or dispose of the family estate, the residue of his fortune should go to A. B. or his nearest relative in the male line. *[Woolmore v. Burrows]* - - 512
- Testator having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her, and not doubting that she would consider his nearest relations as he would have done had he survived her: Held that there is no trust for the next of

kin, but that the wife takes the residue absolutely. *[Sale v. Moore,*

534

- Testator after giving his real and personal estate to his wife in fee, said that he had so given the same to her unfettered and unlimited, in full confidence that, in her future disposition thereof, she would distinguish the heirs of his late father, by disposing of the whole of his estate, together and entire, to such of his father's heirs as she might think best deserved her preference: Held that no trust was created. *[Meredith v. Heneage]* - - 542

See PERPETUITY.

USURIOUS DEBT.

A testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of the legatee. A debt, though usurious, must be deducted from the legatee's share. *[Stanton v. Knight]* - - - 482

VENDOR AND PURCHASER.

- A piece of land imperfectly watered, was described, in the particular, as uncommonly rich water-meadow: Held that this was not such a misrepresentation as would avoid the sale. *[Scott v. Hanson]* 13
- The vendor may confirm an order *nisi*, obtained by the purchaser if the latter neglect to do so. *[Chillingworth v. Chillingworth]* - 291
- A. purchased for B., but without authority, an estate sold under a decree. B. died without adopting

the purchase. The order *nisi* was nevertheless obtained. The Court refused to order B.'s executors to pay the purchase-money ; and, on the heir declining the purchase, discharged the order *nisi*, and directed a re-sale. [*Lord v. Lord*] 503

4. If the executors of a purchaser under a decree refuse to pay the purchase-money, they cannot be compelled to pay it, unless a suit be instituted by the heir. *Ibid.*
5. The amount of deterioration of an estate pending a suit for specific performance having been ascertained by an issue, the purchaser was allowed it out of his purchase-money, which he had paid into Court under an order, with interest from the time when he paid in his money. [*Ferguson v. Tadman*] 530

VOLUNTARY SETTLEMENT.

See SETTLEMENT.—FRAUD, 1.

VOUCHERS.

Where the usual decree for accounts against a personal representative has been taken upon motion, the Master ought to require the vouchers to be produced, although the answer is not replied to. [*Davenport v. Davenport*] - - - 512

WASTE.

See TIMBER.

WEST INDIA ESTATE.

Semble, that by a devise of a West India plantation, the stock, implements, utensils, &c. upon it, will pass. [*Lushington v. Sewell*] 435

WIDOW.

The personal estate of an honorary freeman of the city of London is, in case of his dying intestate, distributable according to the custom of London : and his widow is not barred of her customary share by a settlement which is expressed to be in lieu of all dower or thirds or other portion at common law, or otherwise, out of his freehold and copyhold lands. [*Onslow v. Onslow*] - - - - - 18

WILL.

1. Testator gave his real and personal estate to persons whom he afterwards appointed his executors, in trust, in the first place, to sell an advowson, and apply the proceeds in discharge of his debts and legacies, and, if they should be insufficient, then to raise the deficiency by sale or mortgage of his real estates, and directed his executors to retain their expenses, but did not expressly declare any trust of his personal estate : Held that the personal estate was primarily applicable to the payment of the testator's debts. [*Rhodes v. Rudge*] - - - - - 79
2. Tenant for life, unimpeachable of waste except in the park, demesne lands and woods adjoining the capital messuage, there being no woods of that description, cannot cut timber in any of the woods that are either an ornament or shelter to the messuage. [*Newdigate v. Newdigate*] - - - 131

3. Testatrix gave her real and personal estate to trustees to sell, and directed that the proceeds of the real estate should be taken as part of her personal estate, that out of the monies to arise by such sale, and out of all other her personal estate her legacies should be paid, and gave the residue to A. for life, with remainder over: Held that the real estate was absolutely converted into personalty, and that some of the legacies which had lapsed belonged to the residuary legatee and not to the heir. The legacies not having been paid within a year after the testatrix's death, A. is not entitled to that year's income, but it forms part of the capital of the residue. [*Amphlett v. Park*] - - - - 275

4. A feme covert having power to dispose by will of personal property, and of a real estate at N. by her will, after reciting the power, gave several pecuniary legacies, and then gave to her husband her fields and house at N., likewise the remainder of her personalty, and all she might die possessed of, after payment of her debts, legacies, and funeral and testamentary expenses: Held that the husband took a life-estate only in the realty, notwithstanding the gift to him of all the testatrix might die possessed of. [*Monk v. Mawdsley*] - - - - - 286

5. A testator gave all his real and personal estate to trustees in trust, as to one moiety, for A. for life, with remainder to her children, and, as to the other moiety, for B. and her children in like manner. By a codicil he declared that his estates should not be divided equally between A. and B., but in proportion to the number of their children; and he left A. and B. jointly, his residuary legatees. By another codicil, in order to prevent disputes, he gave one of his estates to A. and her heirs, and the other to B. and her heirs, the number of their children nearly equalizing the value of the two estates. In a subsequent codicil he mentioned that he had bequeathed the first estate to A. and her children, and the second to B. and her children: Held that A. and B. were entitled to these estates for their lives only, with remainders to their children; and that they were not entitled to the personal estate absolutely, but for their lives only, with remainders to their children, and in shares proportioned to the number of their children. [*Lushington v. Sewell*] - - - - - 435

6. A testator directed that one of his residuary legatees should be answerable for all debts due to him from the father of the legatee. A debt, though usurious, must be deducted from the legatee's share. [*Stanton v. Knight*] - - - 482

7. Execution of a trust, created by will, to purchase land to be added and closely entailed to testator's family estate, in possession of T. B.; testator declaring that his object was to have a head to the family;

and that if T. B. should die without male issue, or dispose of the family estate, the residue of his fortune should go to A. B. or his nearest relative in the male line. [*Woolmore v. Burrows*] - - 512

8. Testator having given an annuity to one of his next of kin, and expressed a reason for giving nothing to the others, gave the residue of his property to his wife, recommending to her, and not doubting that she would consider his nearest relations, as he would have done had he survived her. Held that there is no trust for the next of kin, but that the wife takes the residue absolutely. [*Sale v. Moore*] - 534

9. Testator after giving his real and personal estate to his wife in fee, said that he had given the same to her, unfettered and unlimited,

in full confidence that, in her future disposition thereof, she would distinguish the heirs of his late father, by devising the whole of his estate together and entire, to such of his father's heirs as she might think best deserved her preference. Held that no trust was created. [*Meredith v. Heneage*] - - - - 542

*See CONSTRUCTION; CONVERSION.—
DEVISE.—WEST INDIA ESTATE.*

WITNESS.

A witness who had answered some of the interrogatories, but refused to answer the others, was ordered to answer those interrogatories within four days or to stand committed. [*Austin v. Prince*] - - - 348

See DEPOSITIONS, 2.—PRACTICE, 1.

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